No. 16-8255 *** CAPITAL CASE ***	
Title:	**Robert Leroy McCoy, Petitioner** **v.** **Louisiana**
Docketed:	March 9, 2017
Lower Ct:	Supreme Court of Louisiana
Case Numbers:	(2014-KA-1449)
Decision Date:	October 19, 2016
Rehearing Denied:	December 6, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Mar 06 2017	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 10, 2017)
Mar 24 2017	Brief of respondent Louisiana in opposition filed.
Apr 10 2017	Brief amicus curiae of The Ethics Bureau at Yale filed.
Apr 10 2017	Brief amici curiae of The Louisiana Association of Criminal Defense Lawyers, et al. filed.
Apr 11 2017	Reply of petitioner Robert Leroy McCoy filed. (Distributed)
Apr 13 2017	DISTRIBUTED for Conference of April 28, 2017.
Apr 24 2017	Record Requested.
Jun 12 2017	Record received from the Supreme Court of Louisiana (6 boxes).
Jun 15 2017	DISTRIBUTED for Conference of September 25, 2017.
Sep 28 2017	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED limited to Question 1 presented by the petition.

Nov 13 2017	Brief of petitioner Robert L.McCoy filed (to be corrected and reprinted).
Nov 13 2017	Joint appendix filed. (two volumes) **Main Document** **Main Document**
Nov 13 2017	Brief of petitioner Robert L. McCoy filed (Corrected brief received 1/10/18). (Distributed) **Main Document** **Proof of Service** **Other**
Nov 17 2017	SET FOR ARGUMENT ON Wednesday, January 17, 2018
Nov 17 2017	Brief amicus curiae of Cato Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amicus curiae of The National Association of Criminal Defense Lawyers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amici curiae of Ten Law School Professors and the Ethics Bureau at Yale filed. (Distributed) **Proof of Service** **Proof of Service** **Main Document**
Nov 20 2017	Brief amicus curiae of The Criminal Bar Association of England & Wales filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amicus curiae of American Bar Association filed. (Distributed) **Main Document** **Proof of Service** **Certificate of Word Count**
Nov 22 2017	CIRCULATED.
Dec 13 2017	Brief of respondent Louisiana filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 18 2017	Record requested from the Supreme Court of Louisiana.
Dec 20 2017	Brief amici curiae of States of Alabama, Arkansas, Idaho, Indiana, Kansas, Montana, Nevada, South Carolina, Tennessee, Utah, and Wyoming filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 05 2018	Reply of petitioner Robert L.McCoy filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
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***** CAPITAL CASE *****

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT MCCOY, *Petitioner,*

v.

STATE OF LOUISIANA, *Respondent.*

ON WRIT OF CERTIORARI TO THE
LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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***** CAPITAL CASE *****

QUESTIONS PRESENTED

1. Is it unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection?

2. Whether Louisiana's rule, that a prosecutor's strike of an African American juror is irrelevant to the prosecutor's strikes of other African-American jurors if the defense simultaneously struck the same juror, violates this Court's holding in *Foster*, *Miller-El* and *Batson* requiring consideration of all relevant circumstances?

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II. [Question 2] This Court should decide whether Louisiana's rule, that a prosecutor's strike of an African American juror is irrelevant to the prosecutor's strikes of other African-American jurors if the defense

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PETITION FOR WRIT OF CERTIORARI

Petitioner Robert McCoy respectfully requests that the Court grant a writ of certiorari to review the decision of the Louisiana Supreme Court affirming his convictions and death sentences.

The petitioner is the defendant and defendant-appellant in the courts below. The respondent is the State of Louisiana, the plaintiff and plaintiff-appellee in the courts below.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court affirming Mr. McCoy's conviction and sentence is at *State v. McCoy*, 2014-1449 (La. 10/19/2016); ___ So. 3d. ___; 2016 La. LEXIS 2107, and is reprinted in the Appendix at App. A.

The opinion of the Louisiana Supreme Court denying rehearing is at *State v. McCoy*, 2014-1449 (La. 12/6/2016); ___ So. 3d. ___; 2016 La. LEXIS 2485, and is reprinted in the Appendix at App. B.

JURISDICTION

Petitioner invokes this Court's jurisdiction to grant the Petition for a Writ of Certiorari to the Louisiana Supreme Court on the basis of 28 U.S.C. § 1257. The Louisiana Supreme Court denied Petitioner's appeal on October 19, 2016. The Louisiana Supreme Court denied Petitioner's application for rehearing on December 6, 2016. This petition follows timely pursuant to Supreme Court Rule 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The questions presented implicate the following provisions of the United States Constitution and the Louisiana Code of Criminal Procedure:

AMEND. VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMEND. XIV: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LA. C. CR. P. ART. 795. Time for challenges; method; peremptory challenges based on race or gender; restrictions

C. No peremptory challenge made by the state or the defendant shall be based solely upon the race or gender of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race or gender, and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory race or gender neutral reason for the exercise of the challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.

D. The court shall allow to stand each peremptory challenge exercised for a race or gender neutral reason either apparent from the examination or disclosed by counsel when required by the court. The provisions of Paragraph C and this Paragraph shall not apply when both the state and the defense have exercised a challenge against the same juror.

STATEMENT OF THE CASE

A. Introduction

Petitioner Robert McCoy was convicted of three counts of first degree murder on August 4, 2011. Following a penalty phase, the jury returned a verdict of death on each of the three counts and Mr. McCoy was formally sentenced to death in accordance with the jury's verdict on January 23, 2012.

His convictions and sentences were affirmed on direct appeal by the Louisiana Supreme Court in 2016, *State v. McCoy*, 2014-1449 (La. 10/19/2016); ___ So. 3d. ___ reh'ng denied (La. 12/6/16).

Mr. McCoy was convicted and sentenced to death after his counsel conceded his guilt over his repeated, timely and express objections. The jury that convicted and sentenced Mr. McCoy to death was tainted by the prosecution's racially discriminatory peremptory challenges but Mr. McCoy was prevented from presenting relevant evidence of the prosecutor's discriminatory intent by an unconstitutional Louisiana law.

Mr. McCoy now petitions this Court for a writ of certiorari to the Louisiana Supreme Court to reverse his convictions and sentences as they were obtained in violation of his Sixth and Fourteenth Amendment rights.

B. Factual background relevant to question one

Mr. McCoy was arrested on May 9, 2008 for the first degree murders of the son, mother, and step-father of his estranged wife in a May 5, 2008 shooting. App. A, 2-3.

On May 15, 2008, following his extradition from Idaho, Mr. McCoy was found to be indigent and appointed a public defender. App. A, 4.

Throughout his representation by the public defender and his subsequent representation by retained counsel Mr. McCoy steadfastly and adamantly maintained his innocence, and repeatedly stated his desire to plead not guilty, to go to trial, to advance his innocence claim and ultimately, to secure a complete acquittal.

In December 2009 Mr. McCoy moved for his public defender to be removed due to his belief that the public defenders were doing nothing to assist him in proving his innocence, resulting in a breakdown in their relationship. App. A, 4. Mr. McCoy sought to represent himself until he could retain counsel. App. A, 4. Following a *Faretta*[1] hearing on February 11, 2010, Mr. McCoy was permitted to represent himself on the understanding that he would represent himself through trial if he did not retain counsel. App. A, 4-5.

On March 2, 2010, Mr. Larry English enrolled on behalf of Mr. McCoy as retained counsel after Mr. McCoy's parents paid him $5,000 they had borrowed against their car title. App. A, 5, 11-12.

Trial was ultimately set for July 28, 2011 and about a month prior to trial, defense counsel visited with Mr. McCoy to tell him that his case could not be won and that he needed to take a plea. App A, 14; VI.724.[2] Mr. McCoy adamantly refused to take a plea.

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[1] *Faretta v. California*, 422 U.S. 806, 834 (1975)

[2] References to the Louisiana appellate record refer to volume number and page.

On July 12, 2011, only two weeks prior to trial, a hearing was held at which Mr. English stated that he would not offer any alibi evidence, despite Mr. McCoy's *pro se* alibi notice, and declined to adopt any of the subpoenas Mr. McCoy had filed. App. A, 6-7.

Immediately after the court hearing, Mr. English visited Mr. McCoy in the cells and told him for the first time that he intended to concede that Mr. McCoy was the killer. Mr. McCoy emphatically opposed this course. Mr. English provided undisputed testimony, describing the encounter:

> 9. On July 12, 2011 I met with Robert at the courthouse and explained to him that I intended to concede that he had killed the three victims in the guilt phase of his trial in an effort to save his life. This was the first time that I had told Robert that I intended to concede to the jury that he was the killer. Robert was furious and it was a very intense meeting. He told me not to make that concession but I told him that I was going to do so. I explained that I felt I had an ethical duty to save his life, regardless of what he wanted to do. I ended the meeting as it was becoming too intense. This was essentially the end of our professional relationship. From that time on he saw me not as his lawyer but as his enemy - part of the system that was conspiring to convict him of a crime he believed that he had not committed.
>
> 10. I next went to see Robert at Bossier Max on the weekend before trial was due to start. Robert came out to the interview but expressed surprise and frustration that I was there. He told me that he had already fired me and that I had no business on his case anymore. Robert told me that he had arranged for two other lawyers to come onto the case to replace me. He remained very angry with me and felt that I had betrayed him. Robert made it very clear that he believed that he was entitled to discharge me as his counsel and that he had done so. This was a relatively short interview. I tried to see him again on the Monday but he refused to see me-
>
> 11. I know that Robert was completely opposed to me telling the jury that he was guilty of killing the three victims and telling the jury that he was crazy but I believed that this was the only way to save his life. I needed to maintain my credibility with the jury in the penalty phase and could not do that if I argued in the guilt phase that he was not in

> Louisiana at the time of the killings, as he insisted. I consulted with other counsel and was aware of the Haynes case and so I believed that I was entitled to concede Robert's guilt of second degree murder even though he had expressly told me not to do so. I felt that as long as I was his attorney of record it was my ethical duty to do what I thought was best to save his life even though what he wanted me to do was to get him acquitted in the guilt phase. I believed the evidence to be overwhelming and that it was my job to act in what I believed to be my client's best interests.

Appellate Record VI.724-5; XVII.3802-10.[3]

On Tuesday, July 26, 2011 the trial court conducted a hearing on Mr. McCoy's desire to discharge Mr. English. App. A, 7. The court denied Mr. McCoy's request to discharge Mr. English as untimely, given that substitute counsel were not present and trial was due to start in two days.[4] App A, 7. Mr. McCoy immediately sought to represent himself but the trial court cut him off, refusing to entertain the request on the basis that it was untimely:

> MR. MCCOY: Through *Ache [sic] versus Oklahoma*, Your Honor, I have the right to speak, I have a right to represent myself through *Ache [sic] versus Oklahoma*, Your Honor, and too –
>
> THE COURT: Not at this time, Mr. McCoy, the *State versus Bridgewater* [case] states that you have unequivocally given up that right because . . . you have not made that known to the Court unequivocally before this date. So I will instruct you to speak through Mr. English at this time and . . . Mr. English is your attorney and he will be representing you . .

App A., 7, 15; VIII.1672.

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[3] The Louisiana Supreme Court acknowledged that Mr. English acted against Mr. McCoy's express wishes but did not detail the evidence of their communications in its opinion, presumably because it attached no constitutional significance to Mr. McCoy's objections. App. A, 21. At the motion for new trial hearing, Mr. English swore in his declaration as his direct evidence and was then subject to cross-examination and re-direct. XVII.3802-10; VI.723-7 (Declaration of Larry English).

[4] At the motion for new trial hearing, defense counsel introduced Sheriff's Office recordings of jail calls from Mr. McCoy to his father. Following his July 12, 2011 meeting with Mr. English, Mr. McCoy asked his father to find substitute counsel and was assured that counsel had been secured and would be present at court. XVII.3840, Ex. B (Recorded jail calls).

Mr. English then sought guidance from the trial court, advising that contrary to Mr. English's intention, Mr. McCoy wished a defense to be presented in the guilt phase of his trial and the trial court ruled that as Mr. English was the attorney, it was for Mr. English to make the decision of what defense he would proceed with at trial:

> MR. ENGLISH: Your Honor, at this time I'm going to ask for an ex parte hearing with the Court to discuss my representation with Mr. McCoy . . . . Mr. McCoy is insistent that I put forward a defense in this case at the guilt phase of this trial. I have made a determination, Your Honor, that the evidence in this case is so overwhelming against Mr. McCoy that in order to do that . . . .
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> * * *
>
> THE COURT: . . . I think that you've stated this on the record prior to this date . . . . I believe that - you are the attorney, sir . . . . And you have to make the trial decision of what you're going to proceed with . . . .

App. A, 20; VIII.1675-6.

Opening statements in the guilt phase were conducted on August 3, 2011. During his opening statement, Mr. English explicitly and repeatedly conceded that Mr. McCoy had murdered the three deceased, "I'm telling you, Mr. McCoy committed these crimes." App. A, 7, 21. Mr. English argued for verdicts of second degree murder on a theory of diminished capacity: a theory wholly foreclosed by Louisiana law.[5] App. A, 7, 23.

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[5] As the Louisiana Supreme Court discusses at App. A, 23, n.35, Louisiana does not recognize a defense of diminished capacity and, absent a plea of not guilty by reason of insanity, a defendant may not introduce evidence of mental defect at the time of the crime. *See also State v. Dressner*, 08-1366 (La. 7/6/10), 45 So. 3d 127, 143-44; *State v. Holmes*, 06-2988 (La. 12/2/08), 5 So. 3d 42, 74.

Mr. McCoy immediately interrupted defense counsel's opening statement and renewed his objection to being represented by Mr. English and to Mr. English's concession of guilt:

> Judge Cox, Mr. English is simply selling me out, Judge Cox. They know cops killed these people, Judge Cox, and you want me to sit here, Judge Cox, and just let this man throw away all aspects of my due process. I have told you about Mr. English, Your Honor. I tried to get Mr. English removed, Your Honor, and you still kept Mr. English on my case, Your Honor, when I told you Mr. English was not putting up any type of defense for me. He's sitting there vindicating, Your Honor, that I murdered my family. I did not murder my family, Your Honor. I had alibis of me being out of state. Your Honor, this is unconstitutional for you to keep an attorney on my case when this attorney is completely selling me out, Your Honor.
>
> * * * *
>
> I don't want him to represent me, Your Honor.

XV.3269.[6]

Mr. McCoy exercised his right to testify in his own defense, asserting his complete innocence, testifying to his alibi, refuting the State's evidence and describing a drug trafficking ring headed by law enforcement personnel that was responsible for the killings and for framing him. App. A, 7-8.

In closing argument, defense counsel once again repeatedly and emphatically argued that Mr. McCoy murdered the three victims ("He killed them") and explicitly stated that he had relieved the State of its burden of proof and the jury of its burden in this regard ("I took that burden off of Mr. Marvin. I took that burden off of you.").[7]

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[6] The Louisiana Supreme Court references this interruption when describing Mr. McCoy's behavior at trial but, consistent with its view that Mr. McCoy's objection to counsel's actions is irrelevant, did not include in its opinion the text of Mr. McCoy's objection. App. A, 49.

[7] Record quotes appear at XVI.3526, 3530. Mr. Marvin is the name of the District Attorney.

App. A, 21, 43. Defense counsel argued that Mr. McCoy was so mentally defective as to be incapable of forming specific intent and that the verdict should therefore be guilt of second-degree murder. App. A, 21, 43. Once again, Louisiana law wholly forecloses this argument and a lesser verdict could only be returned through juror nullification.[8] App. A, 23, 24.

The jury returned a unanimous verdict of first degree murder on all three counts. App. A, 7. The penalty phase lasted one day, with the State calling five witnesses and the defense calling one witness. App. A, 8. The jury returned three death verdicts. App. A, 8.

Following trial, indigent capital defense counsel were appointed and filed a Motion for New Trial raising claims arising from the involuntary representation by Mr. English and the concession of guilt. App. A, 8. After an evidentiary hearing at which Mr. English provided the evidence described above, the motion for new trial was denied. App. A, 8.

On direct appeal, Mr. McCoy raised a series of interlocking claims arising from the refusal to relieve Mr. English, the denial of self-representation and defense counsel's concession of guilt over the client's objection.

The Louisiana Supreme Court denied the appeal, affirming the convictions and death sentences. App. A, *State v. McCoy*, 2014-1449 (La. 10/19/2016); ___ So. 3d. ___; 2016. The Louisiana Supreme Court held that:

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[8] Louisiana recognizes the power of juries to nullify and return a responsive verdict of guilty of a lesser offense even though the evidence clearly and overwhelmingly supports a conviction of the charged offense. *State v. Porter*, 93-1106 (La. 7/5/94); 639 So. 2d 1137, 1140. However, defense counsel did not seek and the jury did not receive any instruction to this effect in this case.

- Mr. McCoy's request to discharge Mr. English was untimely, as it arose on the eve of trial (App. A, 13);
- Mr. McCoy's request to represent himself was untimely and given that it was only one sentence long, was not sufficiently unequivocal (App. A, 15, 16);
- the trial court did not err in ruling that retained counsel could decide to concede guilt over his client's objection where conceding guilt was a reasonable strategy in the face of overwhelming evidence (App. A, 20);
- defense counsel's failure to follow Mr. McCoy's direction not to concede guilt did not deny Mr. McCoy the assistance of counsel or create a conflict of interest because Mr. English did not completely abdicate Mr. McCoy's defense. Mr. English advanced what he saw was the only viable course of action and, in light of *Nixon*,[9] Mr. McCoy had not shown that trial counsel's actions were ineffective (App. A, 22-4); and,
- Mr. McCoy's several Sixth Amendment rights to present a defense along with his rights to an impartial jury and Due Process were not violated because the concession of guilt did not waive Mr. McCoy's constitutional rights but instead was a strategic choice by counsel (App. A, 25).

[9] *Florida v. Nixon*, 543 U.S. 175 (2004).

C. Factual background relevant to question two

Following death qualification, fifty-eight qualified jurors were questioned as a part of general voir dire and were subject to acceptance or peremptory challenge. App. A, 36. Of those fifty-eight, ten were African-American. App. A, 36. Five of these jurors were struck for cause. Of the remaining five African American jurors, the State exercised peremptory challenges against four and accepted one (jurors Curry, Venus, Landry, McWashington and Mitchell). App. A, 36-7.[10] The resulting jury was comprised of eleven white and one African-American jurors. App. A, 36.

The State struck four African-American jurors, the second of whom, Ms. Venus, was a strongly pro-death penalty proponent who was simultaneously struck by the defense. App. A, 36-7. The defense raised a *Batson*[11] objection in respect of the state's strikes and argued that while the defense did not want Ms. Venus reseated, the State's strike of such a pro-death juror was strong evidence of discriminatory intent. *Id.* The trial court accepted the State's submission that as a result of the simultaneous strike of Ms. Venus: the State could not be asked to provide reasons for the strike of Ms. Venus; her strike could not be considered in establishing a *prima facie* case; and, her strike could not be considered as part of the proof of discriminatory intent. *Id.*; XIV.3117.

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[10] The Louisiana Supreme Court's opinion describes the outcome for eight of the African American jurors. By way of completeness, the appellate record further shows that Ms. Eason was struck by the State for cause (XII.2694-5) and Ms. Thomas was struck jointly for cause (XII.2781).

[11] *Batson v. Kentucky*, 476 U.S. 79 (1986).

The defense *Batson* challenge was revisited in the motion for new trial and the defense presented evidence that demonstrated that in trials conducted from January 2007 to July 2011, the Bossier Parish District Attorney's Office struck African Americans at almost two and a half times the rate it rejected white jurors. App. A, 41. The trial court denied the motion for new trial, a ruling the Louisiana Supreme Court upheld, citing its own jurisprudence rejecting reliance upon statistical data in *Batson* cases. App. A, 41.

On appeal, Mr. McCoy argued that the trial court had erred and, in particular, that the trial court had erred in refusing to include in the *Batson* analysis the State's strike of Ms. Venus. App. A, 37-8. The Louisiana Supreme Court ruled that under La. C. Cr. P. art. 795, because Ms. Venus was simultaneously struck by the defense, her strike would not be considered when assessing the other *Batson* objections she was not part of the *Batson* equation:

> Further, the defendant's argument on appeal, that the State's peremptory challenge of Ms. Venus should be considered when evaluating the State's peremptory challenge of Ms. Curry, ignores the clear directives of LSA-C.Cr.P. art. 795(D) to the contrary, given that the defense simultaneously challenged the same juror. Although Paragraph (C) of Article 795 authorizes the trial court to demand a race neutral reason for the exercise of a peremptory challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror, Paragraph (D) of Article 795 provides that the "provisions of Paragraph C and this Paragraph shall not apply when both the state and the defense have exercised a challenge against the same juror." Because Ms. Venus was peremptorily challenged by both the State and the defense, the trial court was not required to order the articulation of race neutral reasons, pursuant to LSA-C.Cr.P. art. 795(D), and we find no *Batson* violation apparent in the peremptory strike of Ms. Venus.

* * * *

> In the instant case, the defendant has not borne his burden under *Batson*. At a point when three African-Americans had been struck peremptorily from the twelve-person jury, the judge acquiesced in the suggestion that the State should articulate reasons; however, it should be noted that, of the two African-American females in that number, one was strongly opposed to the death penalty (Ms. Curry), and the other was struck simultaneously by the State and the defense (Ms. Venus), and thus, was not part of the *Batson* equation, pursuant to LSA-C.Cr.P. art. 795(D).

App. A, 38, 41.

The Louisiana Supreme Court ultimately held that "[n]either the numbers nor the facts support a prima facie showing that the State based its peremptory challenges on race" and that the trial court had not abused its discretion in rejecting the *Batson* objections. App. A, 41.

REASONS FOR GRANTING THE PETITION

I. [Question 1] This Court should decide whether it is unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection.

A. *The Louisiana Supreme Court held that counsel may concede guilt if it is a reasonable strategy, even if the concession is made over the express objection of the client*

The Louisiana Supreme Court held that counsel's concession of guilt over Mr. McCoy's objection should be analyzed as a claim of ineffective assistance of counsel to be assessed under *Strickland*.[12] App. A, 21. In doing so, the Louisiana Supreme Court did not attach any constitutional significance to the fact that counsel was acting against his client's express instructions.

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[12] *Strickland v. Washington*, 466 U.S. 668 (1984).

The Louisiana Supreme Court held that *Cronic's*[13] presumption of prejudice did not apply because defense counsel "did not completely abdicate the defendant's defense, rather Mr. English advanced what he saw was the only viable course of action." App. A, 22.[14]

The Louisiana Supreme Court directly applied this Court's decision in *Florida v. Nixon*, once again, placing no significance on the fact that Mr. McCoy had expressly objected to the concession of guilt. Applying *Nixon*, the Louisiana Supreme Court concluded that as "admitting guilt in an attempt to avoid the imposition of the death penalty appears to constitute reasonable trial strategy," Mr. McCoy had not shown that trial counsel's actions were ineffective. App. A, 24.

For the same reason, the Louisiana Supreme Court affirmed the trial court's ruling that defense counsel, rather than the client, had the authority to determine whether to present a guilt-based defense. App. A, 20.

The effect of the Louisiana Supreme Court's decision is to hold that defense counsel may concede the guilt of a client, ever over the express objection of the client.

B. This Court has not addressed the question presented in this case but the Louisiana Supreme Court's decision conflicts with the decisions of other state courts of last resort

In *Florida v. Nixon*, this Court addressed a narrow question of whether counsel must obtain explicit consent before conceding guilt in a capital case. Rejecting the

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[13] *United States v. Cronic*, 466 U.S. 648 (1984).

[14] The Louisiana Supreme Court also observed that defense counsel remained active at trial, bringing a *Batson* objection and cross-examining some witnesses. App. A, 22-3.

need for explicit consent, the Court held that that "[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." *Nixon*, 543 U.S. at 192.

However, the Court did not address the present situation, where defense counsel informs the defendant of the proposed strategy of conceding guilt and, far from being unresponsive, the defendant vehemently opposes the strategy and directs counsel not to make the concession.

In the present case, the Louisiana Supreme Court concluded that *Nixon* applied even where the client expressly opposed the concession of guilt and that counsel was free to override the client's wishes as long as a concession of guilt might otherwise represent a reasonable strategy.

Other courts to have considered this important federal question have reached decisions conflicting with that of the Louisiana Supreme Court.

In *Cooke v. State*, 977 A.2d 803 (Del. 2009), the Delaware Supreme Court reversed the conviction and death sentence of a prisoner whose counsel argued for a verdict of "guilty but mentally ill" over the express objections of his client who wished to pursue an outright "not guilty" defense. The Delaware court held that counsel could not concede guilt over the client's express objection and that counsel's override of the client's objective "negated Cooke's decisions regarding his constitutional rights, and created a structural defect in the proceedings as a whole." *Id.* at 849.

In *People v. Bergerud*, 223 P.3d 686, 699 n.11 (Colo. 2010), the Colorado Supreme Court held that "[c]ounsel cannot concede the defendant's guilt to a crime over his express objection," distinguishing *Nixon* on the basis of the client's explicit objection to counsel's actions (and because *Nixon* was a capital case).

In *State v. Humphries*, 336 P.3d 1121 (Wash. 2014), the Washington Supreme Court held that while defense counsel can consent to a stipulation to an element of the offense without an accompanying colloquy between the defendant and the trial court, "such a decision may not be made over the defendant's known and express objection." *Id.* The Washington Court maintained that counsel may enter a stipulation and the court may presume consent from the defendant's silence but that "this presumption disappears where the defendant expressly objects." *Id.* at 1125 citing *United States v. Williams*, 632 F.3d 129 (4th Cir. 2011)(reversing where defense counsel's stipulation of an element was made over the defendant's express objection). The *Humphries* Court also rejected the proposition that the caselaw permits counsel to concede guilt in closing over the defendant's objection. *Id.* at 1126, n.4.

In *State v. Carter*, 14 P.3d 1138 (Kan. 2000), the Supreme Court of Kansas held that counsel's concession of guilt over the defendant's objection violated the Sixth Amendment and the Due Process Clause and that prejudice should be presumed. The Kansas Court held that counsel could not impose a guilt-based defense against counsel's wishes and that in doing so, counsel "was betraying the defendant by deliberately overriding his guilty plea". *Id.* at 1148. The Kansas Court also faulted

the trial court for treating the decision as tactical and held that the trial court should have granted the defendant's request to appoint different counsel. *Id.*

In *State v. Anaya*, 592 A.2d 1142, 1145 (N.H. 1991), counsel conceded guilt of a lesser offense, despite the defendant's objection and his sworn testimony of complete innocence. The New Hampshire Court held that the Sixth Amendment question turned upon whether the defendant objected to counsel's concession or whether the concession was authorized. *Id.* at 1146. Finding that the defendant had objected, the New Hampshire Court held that the concession of guilt of a lesser offense over the client's objection violated the defendant's right to the assistance of counsel and that prejudice should be presumed. *Id.* at 1146.

Following *Nixon*, the Supreme Court of North Carolina has continued to endorse its pre-*Nixon* rule that a concession of guilt without the defendant's informed consent is *per se* ineffective. *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) (Counsel's admission of guilt without informed consent deprives the defendant of the right to a fair trial and requires reversal); *State v. Maready*, 205 N.C. App. 1, 9-10 (N.C. Ct. App. 2010)(subsequent to *Nixon*, the North Carolina Supreme Court has continued to apply the analysis set forth in *Harbison*, even in death penalty cases")(gathering cases).

In *United States v. Dago*, 441 F.3d 1238 (10th Cir. Colo. 2006), the Tenth Circuit affirmed its pre-*Nixon* opinion that "The admission by counsel of his client's guilt to the jury . . . represents a paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice." *Dago*, 441 F. 3d at

1250 (quoting *United States v. Williamson*, 53 F.3d 1500, 1511 (10th Cir. 1995)). In *Williamson*, the Tenth Circuit had gathered authorities to illustrate which types of argument by defense counsel would amount to a concession of guilt for these purposes, all of which are equivalent to or exceeded by the concession in Mr. McCoy's case. *Williamson*, 53 F. 3d at 1511.

Prior to *Nixon*, the Fifth Circuit Court of Appeals addressed the issue in reviewing a habeas corpus petition from a Louisiana prisoner under the Anti-Terrorism and Effective Death Penalty Act. *Haynes v. Cain*, 298 F.3d 375 (5th Cir. La. 2002). In *Haynes*, counsel conceded guilt of second-degree murder but argued that the evidence did not prove specific intent to kill, such that first-degree murder was not established. Addressing whether the *Cronic* or *Strickland* standard should apply, the majority held that it is the "distinction between conceding the only factual issues in dispute and acknowledging that the evidence establishing a lesser included offense is overwhelming that is at the core of the *Strickland/Cronic* distinction in this context." *Id.* at 380, n.6. Going further than the Louisiana Supreme Court, the *Haynes* majority accepted that the failure of trial counsel to obtain the defendant's consent may constitute deficient performance but went on to find that the state court was not unreasonable in concluding that prejudice had not been established under *Strickland*. *Id.* at 382-3. The dissent would have found the express objection of the client to be dispositive. *Id.* at 386-7.

More recently, the Fifth Circuit, having regard to this Court's approach in *Nixon*, has suggested that the defendant's express objection may, in fact, be

controlling. *Woodward v. Epps*, 580 F.3d 318, 327 (5th Cir. 2009) ("Here, however, the trial judge afforded Woodward an opportunity to express disagreement with his counsel's tactics on the record, which he did not. Had Woodward expressed disagreement with his counsel's strategy, this might present a closer question as to whether *Cronic's* presumption of prejudice applies. We find that Strickland's standard applies here.")(citing *Nixon*).

C. Mr. McCoy's case presents an excellent vehicle for the resolution of this important constitutional question, being presented in an appellate posture with an undisputed factual record in a death penalty case

The question presented addresses an important question of federal constitutional law which should be, but has not been, settled by this Court and as to which state courts of last resort conflict.

The case comes before this Court on review of a direct appeal decision but, as a result of the motion for new trial proceedings, also provides an undisputed factual record, including the attorney-client communications in which the client clearly objected to counsel's proposed course. Counsel's concession of guilt in this case in opening and closing was repeated and thorough.

The Louisiana Supreme Court has directly addressed the constitutional issues and held that the federal constitution authorizes capital counsel to concede guilt over their client's express objections. If this is a legitimate course for counsel to adopt, then it is one that all reasonably effective capital counsel must actively consider in each case or themselves risk providing ineffective assistance.

In the absence of this Court's intervention, Mr. McCoy will be eligible for execution based upon a trial in which his own lawyer told the jury he was guilty despite Mr. McCoy's protestations of innocence.

The death penalty, by its nature, demands an "especially vigilant concern for procedural fairness and for the accuracy of factfinding" and "a correspondingly greater degree of scrutiny of the capital sentencing determination." *Monge v. California*, 524 U.S. 721, 732 (1998); *Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985).

A trial in which counsel concedes guilt over his client's protestations of innocence cannot hope to meet these standards, containing even less adversarial testing than a case in which a defendant is forced to proceed without counsel. *cf. Cronic* ("Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented.") quoting *Betts v. Brady*, 316 U.S. 455, 476 (1942) (Black, J., dissenting).

A grant of certiorari is for these reasons all the more appropriate.

D. The constitutional rights at issue are of fundamental importance and the Louisiana Supreme Court's ruling runs contrary to the text and history of the rights guaranteed by the Sixth Amendment

In *Faretta*, this Court emphasized that the right to make a defense is personal to the accused, and does not merely provide "that a defense shall be made for the accused" but instead that "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 819-20.

The Court held that the counsel provision supplements the overall design of the Sixth Amendment, which grants the right to defend to the accused personally. *Id.* at 820. The Court emphasized that the text of the Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Id.* The Court went on to describe the counsel guaranteed by the Sixth Amendment as a defense tool intended to "be an aid to a willing defendant" and rejected the idea that the personal character of the right to make a defense could be stripped away by transforming the counsel intended to be an assistant into the master. *Id.*

Reviewing the Sixth Amendment's roots in English legal history, the Court confirmed that the right of an accused to make his defense existed long before a right to counsel and was not intended to be replaced by the introduction of a right to act through counsel. *Id.* at 824-6.

Reviewing the legal and political context in the colonies, the Court found that the Sixth Amendment was drafted against a backdrop of distrust of lawyers and a commitment to the natural law thinking that saw the right of pleading through counsel as an appendage to the natural right to plead one's own cause. *Id.* at 826-30.

Summing up, this Court stated that "the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an 'assistance' for the accused, to be used at his option, in defending himself." *Faretta*, 422 U.S. at 832.

The choice to use the tool of counsel to assist in one's defense does not and was never intended to extinguish the more fundamental, personal right to make a defense, even if counsel advises that making a defense is a bad idea. *Faretta* v, 422

U.S. at 833-834 ("And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.")

Furthermore, granting counsel authority to override the accused in this regard would sever the constitutional guarantee of assistance of counsel from the historic roots of the concept of counsel, which lie in a relationship of principal and agent. *Faretta*, 422 U.S. at 821.

This Court has consistently analyzed the relationship between client and lawyer as one between principal and agent and applied principles of agency law.[15] The principles of agency anticipate that counsel will comply with the client's lawful instructions, that the client may limit the lawyer's authority by contract or instructions and that the client, not the lawyer, sets the goals of the representation.[16] The Rules of Professional Conduct in virtually every state also provide that the lawyer shall abide by a client's decision concerning the objectives of representation.[17]

This Court has held that as a practical matter, an attorney operates with implied authority to manage the conduct of the trial without needing to obtain the

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[15] *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-634 (1962) citing *Smith v. Ayer*, 101 U.S. 320, 326 (1880); *Coleman v. Thompson*, 501 U.S. 722, 754 (1991); *Commissioner of Internal Revenue v. Banks*, 543 U.S. 426, 436 (2005); *Gonzalez v. United States*, 553 U.S. 242, 257 (2008)(Scalia J. concurring); *Maples v. Thomas*, 565 U.S. 266, 280-1 (2012).

[16] *Restatement (Third) of Agency* §1.01 (2006); *Restatement (Third) of Law Governing Lawyers* (hereafter *Restatement Lawyers*), § 16, comment c, § 21, cmt. b (2000).

[17] Model Rules of Professional Conduct, Rule 1.2 ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . ."). This rule or its equivalent has been adopted in every state, save California, which has structured its rules substantially differently from the Model Rules. *See also Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983)(Citing proposed Model Rule 1.2 with approval).

defendant's consent prior to each tactical decision. *Taylor v. Illinois*, 484 U.S. 400, 417-418 (1988); *Faretta*, 422 U.S. at 820.

However, it does not logically follow, that an attorney may also take action on behalf of the client over the client's express objection. *Gonzalez v. United States*, 553 U.S. 242, 254 (2008)(Scalia J., concurring)("we are not speaking here of action taken by counsel over his client's objection--which would have the effect of revoking the agency with respect to the action in question."); *Restatement Lawyers* § 23, cmt. C ("However, a lawyer has no right to remain in a representation and insist, contrary to a client's instruction, that the client comply with the lawyer's view of the client's intended and lawful course of action.")[18]

Particularly for decisions concerning the objectives of representation, the attorney-agent must act within the lawful instructions of the client-principal. *Banks*, 543 U.S. at 436 (while a client relies upon the attorney's expertise and skill, the client retains "ultimate dominion and control over the underlying claim").

As this Court stated in *Cronic*, "even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." *Cronic*, 466 U.S. at 657. The Louisiana Supreme Court's holding is completely at odds with this basic proposition.

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[18] The same historical source relied upon by members of this Court in discussing our unitary competency standard recognizes the prisoner's authority "to instruct counsel, or to withdraw his authority if he acts improperly, as a prisoner may always do." *Godinez v. Moran*, 509 U.S. 389, 405 (1993) (Kennedy J. concurring) citing *Regina v. Southey*, 4 Fos. & Fin. 864, 872, n. a, 176 Eng. Rep. 825, 828, n. a (N. P. 1865). Indeed, the prisoner's authority in this respect, justified the need for trial competency.

It is inconceivable that the Framers intended that the assistance of counsel should come at the price of defense counsel being authorized to tell the jury that the accused is guilty, even over the accused's protestations of his own innocence.

In addition to the violence that such a notion does to the Sixth Amendment's guarantee of a personal right to make a defense, it also radically changes the role of an independent bar in our constitutional democracy.

Charged with the power to override the client's protestations of innocence, counsel are less well placed to act "as a check on prosecutorial abuse and government overreaching"[19] and at greater risk of becoming "synonymous with the cringing Attorneys-General and Solicitors-General of the Crown and the arbitrary Justices of the King's Court, all bent on the conviction of those who opposed the King's prerogatives, and twisting the law to secure convictions."[20]

II. [Question 2] This Court should decide whether Louisiana's rule, that a prosecutor's strike of an African American juror is irrelevant to the prosecutor's strikes of other African-American jurors if the defense simultaneously struck the same juror, violates this Court's holdings in *Foster*, *Miller-El* and *Batson* requiring consideration of all relevant circumstances.

A. Louisiana's restrictive rule egregiously misapplies settled law that all relevant circumstances are to be taken into account in a Batson *analysis*

It is true that by its language, Louisiana's statutory prohibition on race based peremptory challenges does not apply when both the State and the defense have exercised a challenge against the same juror. La. C. Cr. P. art. 795(D) ("The

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[19] *Kaley v. United States*, ___ U.S. ___; 134 S. Ct. 1090, 1114 (2014) (Roberts C.J., dissenting).

[20] *Faretta*, 422 U.S. at 826.

provisions of Paragraph C and this Paragraph shall not apply when both the state and the defense have exercised a challenge against the same juror.")

In Mr. McCoy's case, the Louisiana Supreme Court went on to hold that by operation of this statute, the prosecution's strike of Ms. Venus should not be considered when evaluating the prosecution strikes of other African American jurors because the defense had also exercised a peremptory challenge against Ms. Venus. App. A, 38, 41.

However, this Court in *Batson* held that "the trial court should consider all relevant circumstances" and that "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination." *Batson* 476 U.S. at 96-7. The Court then stated that "[o]nce the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Batson* 476 U.S. at 97.

The *Batson* framework seeks to extract answers to determine why the State was striking black jurors in a manner that gives rise to an inference of racial discrimination. *Johnson v. California*, 545 U.S. 162, 172-173 (2005). That inference is particularly strong where, apart from race, a struck juror appears to be so much more favorable to the State that the defense exercised a peremptory challenge against her.

In *Miller-el*, the Court reiterated that a defendant "may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

Indeed, the Court in *Miller-el* expressly considered the answers of prospective jurors even though they had been struck by the defense, holding that their answers remained relevant to assessing the State's discriminatory intent. *Id* at 245 ("The fact that Witt and other venire members discussed here were peremptorily struck by the defense is not relevant to our point. . . . the underlying question is not what the defense thought about these jurors[.]").[21]

Once again, in *Foster*, this Court emphasized the imperative to take all relevant evidence into account:

> We have "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S., at 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175. As we have said in a related context, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).

Foster v. Chatman, ___ U.S. ___, 136 S. Ct. 1737 (2016).

In Mr. McCoy's case, the Louisiana Supreme Court quoted from this precise passage in *Foster*, not to hold that the State's strike of Ms. Venus must be considered, but instead to support its rule that statistics alone cannot support a *prima facie* case. App. A, 41 n.43.

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[21] Further to this point, "the constitutional rights *Batson* sought to vindicate are not limited to the rights possessed by the defendant on trial." *Johnson*, 545 U.S. at 171-2. And so for this reason also, the underlying question is not what the defense thought about the struck juror.

The rule announced by the Louisiana Supreme Court "egregiously misapplied settled law"[22] that all relevant circumstances are to be taken into account in a *Batson* analysis.

B. This Court should intervene because Louisiana's rule prohibits courts in Louisiana from considering some of the most damming evidence of discriminatory intent

As the defense argued at trial, the fact that the state struck Ms. Venus, a juror so pro-death that the defense also exercised a peremptory challenge against her, was a relevant circumstance in considering whether the defense had established a *prima facie* case or carried its burden to prove discriminatory intent.

The State's suspect strike of Ms. Venus was particularly relevant in this case where the State argued that it struck jurors based on their willingness to impose a death sentence. XIV.3118 ("No secret here. I'm trying to get people on the jury that I think will impose the death penalty. I don't want the doves. I want the hawks."). In offering reasons for its strikes of Ms. Curry and Mr. Landry, the District Attorney argued that he had struck each because he did not believe that either was sufficiently pro-death penalty. App. A, 37.

The evidence that the trial court and the Louisiana Supreme Court refused to consider because of La. C. Cr. P. art. 795(D) shows that Ms. Venus was affirmatively and aggressively pro-death. On the State's proffered rationale for its other strikes, Ms. Venus should not have been the subject of a State strike. Indeed, the

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[22] *Wearry v. Cain*, ___ U.S. ___, 36 S. Ct. 1002, 1007 (2016)(granting summary reversal where Louisiana Supreme Court egregiously misapplied settled law).

prosecution's strike of Ms. Venus was strong evidence that its stated reasons for striking other African-Americans were pretextual.

In her questionnaire, Ms. Venus chose options indicating she was "generally in favor of the death penalty," checked that she "agree[d]" that "the death penalty gives the criminal what he deserves" and wrote in that she felt "strongly" about the death penalty. Venus Juror Questionnaire, Questions 32(C), 95, 96(C) and 104(b).

The State asked Ms. Venus only four questions[23] in death qualification voir dire. IX.1962. Ms. Venus' answers to the state's four questions indicated that she: believed in the death penalty; could see imposing the death penalty for the killing of innocent people; believed herself capable of returning a death penalty; and, could give consideration to both penalties. IX.1962. Defense questioning disclosed that Ms. Venus strongly believed in the death penalty and could not consider childhood abuse as a mitigating circumstance. IX. 1966-7. Ms. Venus was obviously a favorable juror for the State and a disaster for the defense.

Applying La. C. Cr. P. art. 795(D), the trial court did not require the State to offer a race neutral reason for the strike of Ms. Venus and so no rebuttal was offered to the defense contentions that she was struck because she was African American. Nevertheless, the trial court and the Louisiana Supreme Court refused to consider the State's otherwise inexplicable strike of Ms. Venus.

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[23] Ordinarily, "lack of questioning or mere cursory questioning before excluding a juror peremptorily is evidence that the explanation is a sham and a pretext for discrimination." *Alex v. Rayne Concrete Serv.*, 2005-1457 (La. 1/26/07); 951 So. 2d 138, 154 citing *Miller-El*, 545 U.S. at 246.

The strike of Ms. Venus: deepened the proof of a pattern of discriminatory strikes; put a lie to the State's claim that it was striking jurors based upon their views of the death penalty; and, in the absence of an alternative explanation, was evidence of a racially motivated strike that rendered a racial motive for the other prosecutorial strikes of African Americans more likely.

The effect of Louisiana's rule is to insulate from the *Batson* analysis the most suspect of prosecution strikes (those where the defense also wishes to strike the juror).

C. Mr. McCoy's case represents an excellent vehicle for resolving the question presented and this Court should take the opportunity to summarily reverse, particularly in light of Louisiana's dismal history of applying Batson

The question presented is squarely before this Court on direct appeal in a death penalty case,[24] was expressly argued in the trial court and appellate court and the ruling below decides an important question of federal law that conflicts directly with relevant decisions of this Court.

While the error here may be susceptible to review in federal habeas proceedings, Mr. McCoy must necessarily exhaust his state post-conviction remedies on all available claims before commencing habeas proceedings. It will be some considerable time before a federal habeas court has any opportunity to review this case and during this time Mr. McCoy will sit on death row "in service of a conviction

[24] As argued above, the fact that this is a death penalty case weighs in favor of granting Mr. McCoy's application.

that is constitutionally flawed."[25] During that time, the Louisiana Supreme Court's rule will continue in effect throughout Louisiana. Furthermore, there is no certainty that the present issue will be reached in federal habeas proceedings and so the rule may continue undisturbed.

Of course, the issue here is not important solely for Mr. McCoy or Louisiana but affects our nation's "overriding interest in eradicating discrimination from our civic institutions". *Johnson*, 545 U.S. at 172. As this Court observed in *Batson*, the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Batson*, 476 U.S. at 87.

This Court has recently emphasized the call for our Nation to rise above racial classifications and to purge racial prejudice from the administration of justice. *Pena-Rodriguez v. Colorado*, 15-606 (March 6, 2017), *slip op.* 13. In doing so, this Court emphasized that racial discrimination in the jury system poses a particular threat to the promise of the Fourteenth Amendment and to the integrity of the jury trial. *Id.*

In considering whether to intervene now, it is proper for this Court to consider that Louisiana has a dismal history of enforcing the right to Equal Protection in jury selection[26] and of enforcing *Batson's* mandate.

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[25] *Weary*, 136 S. Ct. at 1008.

[26] Over the course of the last century, this court has had to intervene numerous times due to Louisiana's failure to afford Equal Protection in jury selection. *Pierre v Louisiana*, 306 U.S. 354 (1939); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *Campbell v. Louisiana*, 523 U.S. 392 (1998).

In *Snyder*, this Court was forced to reverse the Louisiana Supreme Court's twice repeated rejection of a clearly meritorious *Batson* claim. *Snyder v. Louisiana*, 552 U.S. 472 (2008)(Reversing the Louisiana Supreme Court after having previously granted certiorari and remanded for reconsideration in light of *Miller-el*). The application for certiorari in that case was accompanied by an *amicus* brief from the Louisiana Association of Criminal Defense Lawyers documenting the State's *Batson* jurisprudence and concluding that "it is virtually impossible for a criminal defendant to succeed on review of a *Batson* claim under the standard as applied in Louisiana." *Snyder v. Louisiana*, 06-10119, 2006 U.S. Briefs 10119, 2 (May 18, 2007).

In 2016, this Court again granted certiorari on a *Batson* claim out of Louisiana, vacating and remanding for further consideration in light of *Foster*. *Williams v. Louisiana*, ___ U.S. ___, 136 S. Ct. 2156 (2016). The four judge concurrence in that case observed that Louisiana continued to apply a procedural rule that clearly violates the Constitution. *Id.* (Ginsburg, concurring).[27]

The improper rule in *Williams* forms part of the same statute that contains the improper rule applied in Mr. McCoy's case. Together they reflect a legislative

---

[27] On remand, a majority of the Louisiana Fourth Circuit Court of Appeals left the unconstitutional rule untouched and determined that the trial judge had supplied his own reasons for the State strikes *before* determining the question of whether a prima facie case existed and so declined relief. *State v. Williams*, 2013-0283 (La. App. 4 Cir. 09/07/16); 199 So. 3d 1222. Subsequently, the Louisiana Supreme Court has stated that having the trial court supply race neutral reasons does not conform with *Batson*, but the Court nevertheless affirmed that "[s]peculation by a trial court as to what the state's reasons might have been for striking potential jurors, may, if the record is sufficiently clear on all three steps of the *Batson* test, be sufficient to satisfy the requirements of *Batson*." *State v. Crawford*, 2014-2153 (La. 11/16/16); ___ So. 3d ___, *slip op.* 34.

response to *Batson* that functions to undermine the effectiveness of the *Batson* procedure in rooting out discriminatory intent.

This Court should intervene now to correct an egregious misapplication of settled law in an area of great public concern.

CONCLUSION

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,

RICHARD BOURKE, *Counsel of Record*
Attorney for Petitioner

Dated: March 6, 2017

No. 16-8255

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT McCOY, *Petitioner*

v.

STATE OF LOUISIANA, *Respondent*

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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State of Louisiana v. Robert McCoy, 2014-1449 (La. 10/19/2016), _____ So. 3d _____ (2016), *rehearing denied* (12/06/2016)

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

LSA-Code of Criminal Procedure Article 795

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Robert McCoy was convicted of three counts of first degree murder on August 4, 2011. Following a penalty phase, the jury returned a verdict of death on each of the three counts. McCoy was sentenced to death in accordance with the jury's verdict on January 23, 2012.

Petitioner's convictions and sentences were affirmed on direct appeal by the Supreme Court of Louisiana in *State of Louisiana v. Robert McCoy*, 2014-1449 (La. 10/19/2016); ____ So. 3d _____, *rehearing denied* (La. 12/6/2016).

QUESTIONS PRESENTED

1.

Petitioner's claim of the denial of self-representation and defense counsel's concession of guilt in his opening statement to the jury as a reasonable strategy by counsel in the face of overwhelming evidence.

2.

Petitioner's claim of racial discrimination in jury selection based on a simultaneous peremptory strike by both the prosecution and the defense of the same juror and Louisiana's statutory provisions in the Louisiana Code of Criminal Procedure art. 795.

1.

Petitioner's Claim of Denial of Self-Representation and the Defense Counsel's Concession of Guilt in his Opening Statement to the Jury as a Reasonable Strategy by Counsel in the Face of Overwhelming Evidence

Defense counsel's concession of guilt in his opening statement to the jury was a valid and reasonable trial strategy which is reviewed under the usual test for constitutionally adequate assistance of counsel articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U. S. 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In *Florida v. Nixon,* 543 U. S. 175, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004), the defense counsel was faced with the inevitability of going to trial on a capital murder charge and a strong case for the prosecution. The defense counsel concluded that his best course for trial strategy would be to concede Nixon's guilt, thereby preserving credibility to the jury for consideration of any penalty phase mitigation evidence and for defense pleas to spare Nixon's life. Defense counsel tried several times to explain this strategy to Nixon, who remained unresponsive and gave very little, if any, assistance or direction in preparing a defense. At trial, Nixon engaged in disruptive behavior and absented himself from most of the trial. During his trial, McCoy was also disruptive and uncooperative with his counsel who was retained by McCoy's parents after McCoy was not satisfied with counsel from the public defender's office.

Florida v. Nixon holds that it is not invariably ineffective for counsel to concede guilt on some charges, even in a capital prosecution, as part of an effort to make the defense credible. In reversing the decision by the Florida Supreme Court, the Supreme Court in *Florida v. Nixon* held that counsel's failure to obtain defendant's express consent to a strategy of conceding guilt in a capital murder trial in the face of overwhelming and heinous evidence does not automatically render defense counsel's performance deficient.

Admit the Act and Win the Case: Reasonable Trial Strategy

The trial tactic of "admit the act and win the case" by trying to save the defendant's life in a capital murder trial where evidence of guilt is overwhelming, the crime is heinous and the defendant refuses to cooperate with counsel is aimed at maintaining credibility with the jury in the penalty phase. Counsel's strategic choices should not be impeded by a rigid blanket rule demanding the defendant's consent. Counsel's trial strategy under the circumstances of this case satisfies the *Strickland* standard because it is not the equivalent to a guilty plea and McCoy still retained the rights accorded a defendant in a criminal trial.

In *Florida v. Nixon,* the Supreme Court noted:

> Despite (defense counsel's) concession of Nixon's guilt, Nixon retained the rights accorded a defendant in a criminal trial. The State was obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crime

> with which Nixon was charged. That aggressive evidence would be separated from the penalty phase thus enabling the defense to concentrate that portion of the trial on mitigating factors.
>
> The defense reserved the right to cross-examine witnesses for the prosecution and could endeavor, as (defense counsel) did, to exclude prejudicial evidence . . . in the event of errors in the trial or jury instruction, a concession of guilt would not hinder the defendants right to appeal.

The "concession of guilt issue" should be evaluated under the *Strickland v. Washington* standard of analysis of "Did counsel's representation fall below an objective standard of reasonableness" instead of the rigid standard announced in *United States v. Cronic,* 466 U. S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) of automatically presuming prejudice if there is an attorney-client conflict in trial tactics.

Citing *Florida v. Nixon,* the Court of Appeals for the Eleventh Circuit in *Darden v. United States*, 708 F. 3d 1225 (11th Cir. 2/12/2013) and the Seventh Circuit in *United States v. Flores,* 739 F. 337 (7th Cir. 1/03/2014) supported the defense counsel's trial tactics of conceding guilt to preserve credibility with the jury to maintain credibility with the jury in the face of overwhelming evidence.

The United States Fifth Circuit in *Haynes v. Cain*, 298 F. 3d 375, (5th Cir. 2002) (en banc), *cert. denied*, 537 U. S. 1072, 123 S. Ct. 676, 154 L. Ed. 2d 567 (2002) supported application of the *Strickland* standard in evaluating concession of guilt strategy in order to maintain credibility with the jury.

Petitioner's claim of racial discrimination in jury selection based on simultaneous peremptory strike of the same juror by both the prosecution and the defense and Louisiana's statutory provisions in the Code of Criminal Procedure art. 795.

The defense raised a *Batson* objection to the State's peremptory strike of a prospective juror, Venus, an African American woman, who was simultaneously struck by the defense. Louisiana's statutory provisions in Article 795 of the Louisiana Code of Criminal Procedure provide that:

> C. No peremptory challenge made by the state or the defendant shall be based solely upon the race or gender of the juror. If an objection is made that the state or defense has excluded a juror solely on the basis of race or gender and a prima facie case supporting that objection is made by the objecting party, the court may demand a satisfactory race or gender neutral reason for the exercise of the challenge unless the court is satisfied that such reason is apparent from the voir dire examination of the juror. Such demand and disclosure, if required by the court, shall be made outside of the hearing of any juror or prospective juror.
>
> D. The court shall allow to stand each peremptory challenge exercised for a race or gender neutral reason either apparent from the examination or disclosed by counsel when required by the court. <u>The provisions of Paragraph C and this Paragraph shall not apply when both the state and defense have exercised a challenge against the same juror.</u>

Claiming a violation of the rule established in *Batson v. Kentucky,* 476 U. S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) petitioner seeks to expand *Batson* to require a satisfactory race or gender neutral reason for the exercise of a peremptory challenge by the State for the same prospective juror excused by the defense.

LSA-C. Cr. P. art. 795 provides the proper remedy for simultaneous strikes by the State and defense for the same juror by not requiring further revelations or reasons for the strike. The trial court applied this simultaneous strike statute to resolve the defense claim of a *Batson* violation.

Petitioner cites *Miller-El v. Dretke*, 545 U. S. 231 (2005) in support of his claim that the State's simultaneous strike of prospective juror Venus is evidence of a *Batson* violation by the State. This claim is not supported by the evidence. The opinion of the Supreme Court of Louisiana was not unreasonable in light of the evidence presented. Petitioner presented no side by side comparison of black jury venire panelists who were struck and white similar situated panelists who were not and a simultaneous strike of the same prospective juror struck by the defendant does not establish a pattern of discriminatory intent.

REASONS TO DENY THE WRIT

1) Conceding guilt in the guilt phase of a capital murder trial in the face of heinous and overwhelming evidence in order to maintain credibility with the jury in the penalty phase and try to save the defendant's life was a reasonable strategy by defense counsel;

(2) despite the concession of guilt in the face of overwhelming evidence, the defendant retained the rights accorded a defendant in a criminal trial because he was able to appeal trial errors and instruction to the jury errors;

3) heinous and aggressive evidence would be separated from the penalty phase and enable the defense to concentrate on mitigation evidence;

4) LSA-C. Cr. P. art. 795, Louisiana's statute on simultaneous jury strikes provided the proper remedy for simultaneous strikes by the State and the defense against the same prospective juror and there was no *Batson* violation in the *voir dire* process;

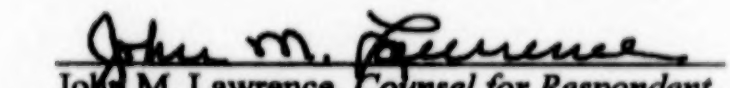
5) petitioner has failed to establish a violation of a constitutional right to warrant the granting of a writ of *certiorari* to the Supreme Court of Louisiana.

CONCLUSION

The Supreme Court of Louisiana in *State of Louisiana v. Robert McCoy,* No. 2014-KA-1449 (La. 10/19/2016), correctly resolved the same issues raised in this petition for Writ of Certiorari by the defense.

Respondent further contends (1) the rulings by the trial court and Supreme Court of Louisiana on the issues of self-representation and concession of guilt by defense counsel in the defendant's opening statement were correct (2) defense counsel's actions were reasonable strategic trial tactics under the circumstances of the case (3) Louisiana's statutory provisions of LSA-C. Cr. P. art. 795 relative to simultaneous peremptory jury strikes by the State and the defendant of the same prospective juror did not violate the rule in *Batson v. Kentucky* and (4) a writ of certiorari to the Supreme Court of Louisiana should be denied.

Office of the District Attorney, 26th Judicial District
J. Schuyler Marvin, District Attorney



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a copy of the Respondent's

Brief in Opposition to Writ of Certiorari

has been served on all parties of interest including counsel for the petitioner by mailing a copy by U. S. Mail, postage prepaid, and addressed to:

Richard Bourke, *Counsel of Record*
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on this 23rd day of March 2017.

John M. Lawrence, *Counsel of Record*

No. **16-8255**

IN THE
SUPREME COURT OF THE UNITES STATES

ROBERT McCOY, *Petitioner*

v.

STATE OF LOUISIANA, *Respondent*

ON WRIT OF CERTIORARI TO THE
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APPENDIX

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Louisiana Supeme Court Opinion and Order Affirming Conviction and Sentence *State of Louisiana v. Robert McCoy,* 2014-KA-1449 (La. 10/19/2016)

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***** CAPITAL CASE *****

No. 16-8255

IN THE
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ROBERT MCCOY, *Petitioner,*

v.

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ON WRIT OF CERTIORARI TO THE
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B. The State of Louisiana's maximalist approach accords no constitutional significance to the consent or objection of the accused, envisaging a right to counsel wholly alien to that guaranteed by the Sixth Amendment 2

II. This Court should grant certiorari to decide whether Louisiana's rule, that a prosecutor's strike of an African American juror is irrelevant to the prosecutor's strikes of other African-American jurors if the defense simultaneously struck the same juror, violates this Court's holdings in *Foster*, *Miller-El* and *Batson* requiring consideration of all relevant circumstances. 4

A. The State of Louisiana's brief in opposition confirms that this issue is ripe for consideration in this case where it does not dispute Petitioner's account or argue that the question should not be reached based upon the proceedings below 4

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REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari to decide whether it is unconstitutional for defense counsel to concede an accused's guilt over the accused's express objection.

A. The State of Louisiana's brief in opposition confirms that this issue is ripe for consideration in this case where it does not dispute Petitioner's account or dispute the existence of a split amongst state courts of last resorts and federal appellate courts

The State of Louisiana has not suggested that Petitioner has misstated the law or fact in his petition nor offered any objection to consideration of the question based upon what occurred in the proceedings below.[1]

The State of Louisiana does not dispute that there is a split between state courts of last resort on the federal constitutional significance of an accused's express objection to counsel conceding guilt.

The two new circuit cases relied upon by the State of Louisiana do not militate against a grant of certiorari and, in any event, address counsel's partial concession of guilt where there is a failure to consult, rather than an express objection.[2]

The petition raises a fundamental constitutional question as to which there is a split amongst lower courts and the petition contains no misstatements nor is there

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[1] Supreme Court Rule 15(2)(admonishing opposing counsel of their obligation to point out any misstatements of which they are aware in the brief in opposition).

[2] *United States v. Flores*, 739 F.3d 337, 340 (7th Cir. Ill. 2014)(Refusing to apply a presumption of prejudice on direct appeal where counsel conceded guilt on one count in the absence of evidence of whether counsel consulted with the accused, whether the accused objected or consented, or what the accused would have done if consulted); *Darden v. United States*, 708 F.3d 1225 (11th Cir. Fla. 2013)(In a case where the accused did not object when counsel conceded guilt, a failure to consult with the client before making the concession did not give rise to a presumption of prejudice).

any reason why the question presented should not be reached based upon the proceedings below.

B. The State of Louisiana's maximalist approach accords no constitutional significance to the consent or objection of the accused, envisaging a right to counsel wholly alien to that guaranteed by the Sixth Amendment

The State of Louisiana frankly and directly argues for a merits resolution of the question presented that even where counsel acts over the accused's express objection, concession of guilt is simply another strategic decision entrusted to counsel to be assessed under the existing rubric set out in *Strickland*. Of course, under *Strickland*, strategic decisions are "virtually unchallengeable". *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

The State of Louisiana is bound to take this approach in order to support the Louisiana Supreme Court's holdings that only *Strickland* applies, that there was no ineffectiveness and that the trial court was right to hold prior to trial that counsel, not the defendant, was responsible for determining the nature of any defense. A-20, 21, 24-5.

The maximalist approach advanced by the State of Louisiana accords no constitutional significance to the accused's express and timely objection to counsel conceding guilt. The State of Louisiana imagines the Counsel guaranteed by the Sixth Amendment as master, not servant, principal not agent and as a figure empowered to argue in the accused's name and bind the accused even against the accused's express objections.

This is not the counsel guaranteed by the Sixth Amendment but a far more sinister character unimagined in our constitution.

The Sixth Amendment expressly guarantees the "Assistance of Counsel for his defence".

At the time of founding "assistance" meant "help, furtherance" and "assistant" was defined as "a person engaged in an affair not as principal but as auxiliary or ministerial."[3] The words could never have been understood to have encompassed the meaning attributed to them by the State of Louisiana.

The language of the Sixth Amendment's guarantee of "the Assistance of Counsel for his defence" was chosen from New York's proposal and in preference to the language proposed by other state conventions ("be allowed counsel in his favor" and "to be heard by himself or his counsel").[4] The choice to guarantee *assistance*, rather than a right to be heard through counsel tends to confirm petitioner's interpretation and is at odds with the maximalist approach urged by the State of Louisiana. The choice of the language came against a backdrop, in both England and the colonies, of counsel serving truly as assistant not master and playing a limited,

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[3] T. Sheridan, *A Complete Dictionary of the English Language* (1796); S. Johnson, 1 Dictionary of the English Language 106 (4th ed.)(accord). This Court has previously relied upon these contemporary sources in interpreting the language of the Bill of Rights. *District of Columbia v. Heller*, 554 U.S. 570, 583-584 (2008). *See also* N. Webster, *American Dictionary of the English Language* (1828) (reprinted 1989) (defining "assistance" as "help; aid; furtherance; succor; a contribution of support in bodily strength or other means.")

[4] See George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. Ill. L. Rev. 543, 571 (2004). *See also* Laura I. Appleman, *The Community Right to Counsel*, 17 Berkeley J. Crim. L. 1, 42 (2012) ("the ability to retain and use counsel was seen less as a replacement for the defendant than as his or her assistant, traditionally utilized on the public stage of a trial. Defense counsel's main use, then, was probably to allow the jury to hear the full ramifications of the case, and not be hindered by whatever defects in presentation the defendant, on his or her own, might possess.")

rather than expansive role in the defense of criminal cases.[5] *See also Amicus Brief of Yale Ethics Bureau* (concluding that "This case demonstrates a complete breakdown in the system of representation meant to secure the fairness of American criminal justice.")

II. This Court should grant certiorari to decide whether Louisiana's rule, that a prosecutor's strike of an African American juror is irrelevant to the prosecutor's strikes of other African-American jurors if the defense simultaneously struck the same juror, violates this Court's holdings in *Foster*, *Miller-El* and *Batson* requiring consideration of all relevant circumstances.

A. The State of Louisiana's brief in opposition confirms that this issue is ripe for consideration in this case where it does not dispute Petitioner's account or argue that the question should not be reached based upon the proceedings below

The State of Louisiana has not suggested that Petitioner has misstated the law or fact in his petition nor offered any objection to consideration of the question based upon what occurred in the proceedings below.[6]

The State of Louisiana has doubled down on the decision of the Louisiana Supreme Court, boldly describing Louisiana's rule of wilful blindness as "the proper remedy for simultaneous strikes". *Brief in Opposition* at 6.

The State of Louisiana also seeks to minimize the effect of the rule, which does not merely prevent obtaining race neutral reasons for the strike but bars consideration of the suspect strike for any other purpose. At the time of writing it is

---

[5] Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. Rev. 1147, 1163-9 (2010).

[6] Supreme Court Rule 15(2)(admonishing opposing counsel of their obligation to point out any misstatements of which they are aware in the brief in opposition).

a rule that extends to thirty-three of Louisiana's forty-two judicial districts. *See Amicus of LACDL* at 24.

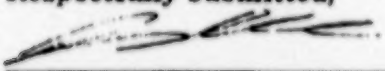
This Court should not hesitate to reaffirm the "imperative to purge racial prejudice from the administration of justice" and to "enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system". *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017).

Louisiana should not be permitted to confect a rule that excludes probative evidence of discriminatory intent from the *Batson* analysis, and certainly not on the basis of a simultaneous peremptory strike by the defense – a factor tending to render the State strike more, rather than less probative of discriminatory intent.

CONCLUSION

Petitioner respectfully pleads that this Court grant his writ of certiorari and permit briefing and argument on the issues.

Respectfully submitted,



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No. 16-8255

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In The
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STATE OF LOUISIANA,

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ON PETITION FOR WRIT OF CERTIORARI TO
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BRIEF OF *AMICUS CURIAE* THE ETHICS BUREAU AT YALE IN SUPPORT OF PETITIONER

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CONSENT TO FILE AS *AMICUS CURIAE*

Pursuant to Rule 37, this brief is filed with the consent of the parties. The brief is submitted by the Ethics Bureau at Yale in support of Petitioner. Letters of consent from both parties to this appeal have been lodged with the Clerk of the Court.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

INTEREST OF *AMICUS CURIAE*

The Ethics Bureau at Yale[1] is a clinic composed of fourteen law school students supervised by an experienced practicing lawyer, lecturer and ethics teacher. The Bureau has drafted amicus briefs in matters involving lawyer and judicial conduct and ethics; has assisted defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility; and has provided assistance, counsel and guidance on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

Because this case implicates a lawyer's ethical obligations to obey his client's objectives during the

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[1] The Ethics Bureau at Yale is a student clinic of the Yale Law School. The views expressed herein are not necessarily those of Yale University or Yale Law School. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *Amicus Curiae* has made a monetary contribution to the preparation and submission of this brief.

course of the representation, the Bureau believes it might assist the Court in resolving the important issues presented.

STATEMENT OF FACTS

On May 29, 2008, Robert McCoy was indicted by a Bossier Parish grand jury on three counts of first degree murder. On June 17, 2008, Mr. McCoy entered a plea of not guilty to these charges. On July 1, 2008, the State of Louisiana gave notice of its intent to seek the death penalty against Mr. McCoy.

On March 2, 2010, Mr. McCoy retained Larry English as counsel. Mr. English replaced the court-appointed public defender. Throughout the representation, Mr. McCoy repeatedly and unequivocally told Mr. English that he wished to go to trial to prove his innocence.

Mr. McCoy's clear instructions notwithstanding, two weeks before trial Mr. English informed Mr. McCoy, for the first time, that he planned on conceding Mr. McCoy's guilt to the jury. Mr. McCoy explicitly and vigorously objected to this concession. Mr. English proceeded to concede guilt at trial nonetheless.

In his opening statement, Mr. English readily conceded Mr. McCoy's guilt. During trial, Mr. English failed to call any witnesses to attest to any other view of the facts than those presented by the prosecution. When Mr. McCoy, his own client, took the stand, Mr. English effectively cross-examined him, attempting to reveal inconsistencies in his

testimony. During his closing argument, Mr. English reiterated that Mr. McCoy was the killer in this case and that he, Mr. McCoy's own lawyer, had relieved the State of its burden to prove that fact.

Amicus's interest is in ensuring that a criminal defendant is never executed without having been granted legal representation commensurate with the dictates of the rules of ethics and the Constitution. In this case, only this Court, by granting the writ and reversing the Louisiana Supreme Court, can assure that result.

SUMMARY OF ARGUMENT

A lawyer is required to be his client's faithful agent. This precept is required most crucially in the context of criminal defense, where it is well established that the defendant alone is the "master" of his own defense. This fundamental ordering—defendant as "master" and counsel as "assistant"—is built directly into the Constitution. The Sixth Amendment grants the right to make a defense to the accused personally—not to the state and not to his lawyer. *Faretta v. California*, 422 U.S. 806, 819 (1975). So structured, the Sixth Amendment guarantees the defendant not only the right to retain counsel but also the concomitant rights to choose and even refuse counsel. The Sixth Amendment therefore does not allow an unwanted counsel to be "thrust upon the accused," *Id.* at 820—nor does it permit an unwanted concession of guilt.

The Louisiana Supreme Court grossly misunderstood the nature of the attorney-client

relationship in this case. The court held that the rules of ethics justified Mr. English's decision to concede Mr. McCoy's guilt over his objection in part because the Rules do not oblige a lawyer to put on perjured testimony. *See* Pet.App. A-20. Not so. Nowhere do the rules of ethics suggest that the prospect of false testimony entitles the lawyer to affirmatively disparage his client's case in court against his express wishes.

The decision over whether to concede guilt at trial is ultimately the defendant's to make. It goes to the very heart of the right to put on a defense—a right that personally belongs to the accused. *Faretta*, 422 U.S. at 819. In this case, Mr. McCoy vigorously and repeatedly expressed his desire to assert innocence at trial. Yet Mr. English disregarded those entreaties and readily conceded guilt. By doing so, Mr. English not only betrayed the sacred bond between lawyer and client, but also denied Mr. McCoy his personal right to put on a defense.

Because of the egregious nature of the ethical failures in this case, Mr. English's conduct should be deemed presumptively prejudicial to Mr. McCoy. In *United States v. Cronic*, 466 U.S. 648 (1984), this Court set forth certain circumstances in which a defense lawyer's conduct is considered prejudicial *per se*. Relevant to the facts here are those cases in which "the accused is denied counsel at a critical stage of the trial" and in which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659. Both occurred here.

Mr. McCoy was constructively denied counsel. By conceding guilt over Mr. McCoy's express objection, Mr. English failed to act within the scope of the attorney-client relationship. He was not, in any meaningful sense, acting as Mr. McCoy's lawyer. Mr. McCoy therefore did not just receive an "incompetent counsel"—he effectively did not receive any counsel "at all." *Childress v. Johnson*, 103 F.3d 1221, 1230 (5th Cir. 1997).

Additionally, Mr. English failed to subject the prosecution's case to meaningful adversarial testing. Indeed, far from testing the prosecution's case, Mr. English seemed downright eager to advance it. He readily conceded Mr. McCoy's guilt in his opening statement; called Mr. McCoy to the stand only to impeach his credibility; and failed to present any evidence that challenged the prosecution's theory of the case. Mr. English's failure to test the prosecution's case thus can only be described as "complete" under *Cronic*. *See Bell v. Cone*, 535 U.S. 685, 696-97 (2002).

Relying on reasoning from the Court's decision in *Florida v. Nixon*, 543 U.S. 175 (2004), the Louisiana Supreme Court declined to find Mr. English's conduct presumptively prejudicial. But *Nixon* only held that a lawyer is not required to obtain affirmative consent from the client before conceding guilt. It expressly did not address the situation presented here, where the client positively objects to conceding. The difference between conceding guilt in the face of a client's non-response and his explicit objection is crucial; for it is the difference between a reasonable strategic decision

based on limited information and total destruction of the attorney-client relationship.

ARGUMENT

I. A Criminal Defendant Has the Right to Serve as the Master of His Own Defense.

The client alone is the master of his defense. This precept finds resonance in the Sixth Amendment, which grants the right to put on a defense directly and personally to the accused—not to his lawyer and not to the state. *Faretta*, 422 U.S. at 819. The Sixth Amendment is so designed because the defendant alone "suffers the consequences if the defense fails." *Id.* at 820. Thus the accused enjoys not only the right to have his defense presented at trial, but also the right to *make the defense himself*, should he so desire.

A defendant's right to be the master of his defense is engaged by the rights to self-representation and choice of counsel. The Sixth Amendment is addressed to the accused; it grants to him personally the right to make a defense. *Id.* at 819. Thus while the Sixth Amendment grants the defendant a right to counsel, it also confers the rights to choose and refuse counsel, *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006). The rights to self-representation and choice of counsel put the defendant's role as "master" of the defense into sharp relief. Together, these rights confirm that the Sixth Amendment does not allow an unwanted counsel to be "thrust [] upon the accused." *Faretta*,

422 U.S. at 819—nor does it permit an unwanted concession of guilt.

A defendant who accepts the assistance of counsel does not forfeit the right to be the master of his defense. *See Faretta*, 422 U.S. at 819-21; *see also United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) ("[W]hile defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense."). To be sure, counsel may have to make some decisions over the course of a representation without first consulting the client. *See, e.g.*, La. Rules of Prof'l Conduct r. 1.4(a)(2) (requiring only that the lawyer "reasonably consult with the client about the means by which the client's objectives are to be accomplished"). But this practical reality does not in any way disturb the fundamental order of the attorney-client relationship; the Sixth Amendment "speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant." *Faretta*, 422 U.S. at 820.

II. The Louisiana Supreme Court Egregiously Misunderstood the Ethical Obligations of Counsel.

The Louisiana Rules of Professional Conduct, like those of every other state, balance the lawyer's duties to his client with those that he carries as an officer of the courts. Rule 3.3 thus "qualifie[s]" the lawyer's obligations "as an advocate" with a "duty of candor to the tribunal." La. Rules of Prof'l Conduct r. 3.3, cmt. 2. Similarly, Rule 1.2 bars the lawyer from helping his client "engage . . . in conduct that the lawyer knows is criminal or fraudulent." *Id.* at r. 1.2.

The Louisiana Supreme Court maintained that these rules, in part, justified Mr. English's decision to concede Mr. McCoy's guilt over his express objection. Not so. The Rules of Professional Conduct should be read as a unified whole. They do not allow—let alone obligate—the lawyer to abandon his role as the client's faithful agent.

A. No defense lawyer is ever ethically required to concede his client's guilt.

While the Rules of Professional Conduct require counsel to advocate on behalf of his client's interests with zeal, the Rules also recognize that the lawyer carries duties to the tribunals in which he practices as an officer of the courts. A lawyer's "obligation to present the client's case with persuasive force" is thus "qualified" by another important ethical obligation, namely the duty of "candor to the tribunal." La. Rules of Prof'l Conduct r. 3.3, cmt. 2.

The duty of candor to the tribunal prohibits the lawyer from "offer[ing] evidence that [he] knows to be false." *Id.* at r. 3.3(a)(3). The Rules do not preclude the lawyer from offering evidence if he only has a "reasonable belief that evidence is false." *Id.* at r. 3.3, cmt. 8. If the lawyer has such a reasonable belief, however, while not required to refuse to offer the evidence in question, he may nevertheless choose to do so. *Id.* at r. 3.3, cmt. 9.

If the client wants to introduce false evidence, Rule 3.3 instructs the lawyer "to persuade the client

that the evidence should not be offered." *Id.* at r. 3.3, cmt. 6; *see also Nix v. Whiteside*, 475 U.S. 157, 169 (1986). If this strategy should fail and the lawyer-client relationship deteriorate as a result, the lawyer may be required "to seek permission to withdraw." La. Rules of Prof'l Conduct r. 3.3, cmt. 15; *see also Nix*, 475 U.S. at 170. In the event that the lawyer "subsequently come[s]" to realize that he has introduced false evidence that is "material" to the case, he "must take reasonable remedial measures." La. Rules of Prof'l Conduct r. 3.3, cmt. 10. Such remedial measures may include a disclosure regarding the false evidence to the court. *Id.*; *see also Nix*, 475 U.S. at 170. Upon disclosure, it would be for the "tribunal [] to determine what should be done." La. Rules of Prof'l Conduct r. 3.3, cmt. 10.

The instructions provided to the lawyer in Rule 1.2, which prohibit the lawyer from helping the client engage in criminal or fraudulent conduct, parallel those in Rule 3.3. Like Rule 3.3, Rule 1.2 instructs the lawyer first "to consult with the client" regarding the lawyer's duties under the rules of ethics, and, failing that, "to withdraw from the representation" should the client insist on engaging in conduct that the lawyer knows to be criminal or fraudulent. *Id.* at r. 1.2, cmt. 10, 13. In the event that the lawyer comes to "discover[]" that he has assisted the client engage in conduct "that he originally supposed was legally proper," Rule 1.2 requires that the lawyer take remedial steps, which may include "disaffirm[ing]" any fraudulent documents. *Id.* at r. 1.2, cmt. 10.

Neither of these Rules even comes close to suggesting that a lawyer may be allowed to concede his client's guilt over the client's express objection. If the client insists on introducing evidence the lawyer reasonably believes to be false, the most drastic measure the Rules contemplate is withdrawal. Even if the lawyer were to discover that he had offered false evidence—a situation this case does not present—at most the Rules would require him to disclose any "material facts" in "an ex parte proceeding." *Id.* at r. 3.3(d). Simply put, the Rules do not allow a lawyer to sell out his client in court against their wishes. Yet that is the astonishing interpretation of the Rules that Mr. English offered in this case and that the Louisiana Supreme Court accepted:

> "[T]he defendant urged in brief to this court that Mr. English should have advanced his 'unflinchingly maintained claim of innocence,' while Mr. English repeatedly advised the trial court that to do so would run afoul of his ethical obligations. See Louisiana Rules of Professional Conduct, Rule 1.2(d) . . . Given the overarching burden of Mr. English's requirement as an attorney to adhere to Rule 1.2(d), the defendant's repeated assertion that 'the principal has the right throughout the duration of the relationship to control the agent's acts' is unpersuasive."

Pet.App. A-19. True, the Rules provided a basis for Mr. English to refrain from offering any testimony

that he knew or reasonably believed to be false, which could have conceivably included Mr. McCoy's alibi defense. But neither Rule 1.2 nor Rule 3.3 suggest that a lawyer has the authority to make a unilateral decision to concede guilt because he doubts the truth of his client's claim of innocence.

Were the Court to allow such a peculiar reading of the Rules, the ethical landscape of the legal profession in this country would suddenly look starkly different than that in the rest of the common law world. In Australia, for example, it has been settled law for over eighty years that even knowledge of guilt does not relieve a lawyer of his obligation to defend his client and hold the government to its burden of proof. *Tuckiar v. The King* (1934) 52 CLR 335, 346 (Austl.). Similarly, the rules of the bar in England and Wales establish that even a client's confession would not allow the barrister to disclose guilt to the court without the client's consent. *See* Bar Standards Board, *The Bar Standards Board Handbook* gC9-11 (2017). While no such bright-line rule exists in the United States, it is instructive that in other common law jurisdictions a lawyer's duty to represent his client prevails even when that client confesses guilt.

In this case, Mr. McCoy did not confess his guilt to Mr. English—far from it in fact. From the beginning, Mr. McCoy asserted his innocence and vehemently objected to conceding guilt at trial. The fact that Mr. English "became convinced that the evidence against Robert McCoy was overwhelming" did not give rise to any sort of ethical dilemma. Pet.App. A-19. To the contrary, the demands of the

Rules of Professional Conduct were straightforward in this case: no lawyer may concede guilt over his client's objection.

B. By conceding Mr. McCoy's guilt over his objection, Mr. English disregarded his ethical obligations and deprived Mr. McCoy of his right to present his defense.

The decision over whether to concede guilt lies at the very heart of the defendant's right to put on a defense. Although a lawyer may make tactical decisions concerning the means used to pursue his client's objectives, the decision over whether to assert innocence at trial rests with the defendant. For a lawyer to override his client's wishes on such a matter is to "den[y] [him] the right to conduct his defense." *State v. Carter*, 14 P.3d 1138, 1148 (Kan. 2000).

There are few decisions in a trial that run a higher risk of damaging the accused than that of conceding guilt. *Cf. United States v. Swanson*, 943 F.2d 1070, 1075 (9th Cir. 1991). The decision over whether to concede guilt therefore is a fundamental component of the client's right to set the objectives of a representation; it is not a mere question of tactics best left to the lawyer's expertise. A lawyer who fails to abide by his client's decision to pursue an innocence-based defense thus fails to offer a defense that can be said to be his client's defense in any real sense. *Cf. Faretta*, 422 U.S. at 821.

Moreover, a lawyer who concedes his client's guilt against his will violates the spirit, if not the letter, of Rule 1.2(a), which provides that a "lawyer shall abide by the client's decision . . . as to a plea to be entered." La. Rules of Prof'l Conduct, r. 1.2(a); *see also Carter*, 14 P.3d 1138 at 1148 (finding that defense counsel's decision to concede guilt at trial over his client's objection "was [] equivalent to entering a plea of guilty" without his client's consent). It is of no moment whether the lawyer finds his client's desire to prove his innocence persuasive, for the lawyer is obligated to honor his client's wishes to stand trial and hold the government to its burden of proof. *See United States v. Cronic*, 466 U.S. 648, 648, 656-57 n.19 (1984).

In this case, Mr. McCoy repeatedly and unequivocally instructed Mr. English to pursue an innocence-based defense at trial, an instruction that Mr. English deliberately disregarded. By doing so, Mr. English undermined Mr. McCoy's stated objective for the representation and denied him his right to present a defense.

III. The Louisiana Supreme Court Erred by Declining To Find Counsel's Conduct Presumptively Prejudicial.

By allowing Mr. English to concede Mr. McCoy's guilt over his express objection, the trial court deprived Mr. McCoy of the right to be the master of his defense. As a result, Mr. McCoy suffered ineffective assistance of counsel. While *Strickland v. Washington*, 466 U.S. 668 (1984) establishes the ordinary standard for showing

ineffective assistance of counsel—constitutionally deficient performance and prejudice to the defendant—*United States v. Cronic*, 466 U.S. 648 (1984) sets out the exceptional circumstances under which a post-conviction petitioner need not meet the *Strickland* prejudice requirement in order to obtain relief. Specifically, *Cronic* holds that a petitioner is not required to show his lawyer's ineffectiveness actually affected the outcome at trial when the misconduct was so egregious as to be *per se* prejudicial. *See id.* at 659.

Cronic identified two relevant situations in which a lawyer's conduct will be deemed presumptively prejudicial. The first is when the defendant "is denied counsel at a critical stage of the trial," and the second is when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* Both occurred here.

A. Mr. English's pursuit of a defense strategy fundamentally incompatible with that selected by Mr. McCoy resulted in the constructive denial of counsel

Because he lacked a lawyer advocating in support of his plea of "not guilty," Mr. McCoy suffered from a constructive denial of counsel, causing *per se* prejudice under the *Cronic* standard. A constructive denial of counsel occurs when a defendant "must navigate a critical stage of the proceedings against him without the aid of 'an attorney dedicated to the protection of his client's rights under our adversarial system of justice.'"

Childress, 103 F.3d 1221 at 1229 (quoting *United States v. Swanson*, 943 2d 1070, 1075 (9th Cir. 1991)). Where a criminal defendant exercises his constitutional right to plead "not guilty," as Mr. McCoy did, his lawyer has an obligation to "structure the trial of the case around his client's plea." *Wiley v. Sowders*, 647 F.2d 642, 650 (6th Cir. 1981). This Mr. English failed to do. In denying Mr. McCoy that right to assert innocence in accordance with his plea of not guilty, Mr. English utterly failed to act within the scope of the attorney-client relationship. Mr. McCoy therefore did not just receive an "incompetent counsel"—he effectively did not receive any counsel "at all." *Childress*, 103 F.3d 1221 at 1230.

Moreover, far from advancing his client's expressed interests, Mr. English blatantly defied them. By premising over his explicit objection Mr. McCoy's "defense" on guilt, Mr. English interfered with Mr. McCoy's right to conduct his defense and violated his Sixth Amendment right to counsel. The Rules of Professional Conduct lay "the ultimate authority to determine the purposes to be served by legal representation" with "the client." La. Rules of Prof'l Conduct r. 1.2, cmt. 1. Thus if a client wants to maintain innocence at trial, the lawyer is not entitled to concede guilt, even if he thinks doing so might ultimately "save his life." Pet.App. A-19. Though it may pain him to do so, the lawyer must allow the client to make this momentous choice for himself, "for it is he who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 820.

B. Mr. English completely failed to subject the prosecution's case to meaningful adversarial testing.

Mr. English's conduct during the course of trial clearly matches the Court's description of a lawyer's "complete" failure "to subject the prosecution's case to meaningful adversarial testing," as described in *Cronic* and *Cone*. *Cronic*, 466 U.S. at 659; *Cone*, 535 U.S. at 697. In pleading "not guilty," Mr. McCoy indicated his intention to hold the government to its strict burden of proving guilt beyond a reasonable doubt. Yet, as he would admit in his closing, Mr. English "took that burden" off the government over the course of trial. R. at 3526.

Far from testing the prosecution's case, Mr. English confirmed it, over and over again throughout trial. In his opening statement, Mr. English stated that the "District Attorney can prove its case." R. at 3267. At trial, Mr. English failed to call a single witness other than Mr. McCoy. And when Mr. English did call Mr. McCoy, he only did so to reveal inconsistencies in his claim of an alibi and to impeach his credibility. In essence, Mr. English cross-examined his own client.

Mr. English's apparent purpose was to demonstrate that Mr. McCoy was suffering from a mental defect and thus incapable of forming the crime's requisite specific intent. But this purpose was rendered moot by Louisiana's evidentiary rules. In Louisiana, "[w]hen a defendant is tried upon a plea of 'not guilty'"—as opposed to a plea of "not

guilty and not guilty by reason of insanity"—then "evidence of insanity or mental defect at the time of the offense shall not be admissible." La. Code of Crim. Proc. art. 651.[2] Because Mr. McCoy pleaded "not guilty," any evidence tending to show he was unable to form a specific intent due to insanity would not have been admissible. Mr. English's only attempt to contest the prosecution's case was thus ineffective as a matter of law.

The Sixth Amendment demanded more from Mr. English. *Cronic* and *Cone* do not address a lawyer's mere *attempt* to contest the prosecution's case, but instead conclude that a lawyer is ineffective when he "entirely fails to subject the prosecution's case to *meaningful* adversarial testing." *Cronic*, 466 U.S. at 659 (emphasis added). The word "meaningful" as used in *Cronic* would be rendered meaningless if a mere attempt to introduce inadmissible evidence—evidence that, absent its intended but impermissible purpose, served only to aid the prosecution—were to suffice as "meaningful adversarial testing."[3] Mr. English thus did not

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[2] *See also State v. Holmes*, 06-2988 (La. 12/2/08), 5 So. 3d 42, 74-75 (holding that evidence of defendant's mental incapacity not admissible to show insanity and an inability to form specific intent).

[3] The Fifth Circuit has held that there is not a "complete" failure to subject the prosecution's case to meaningful adversarial testing where counsel meaningfully contests one element of the prosecution's case. *Haynes v. Cain*, 298 F.3d 375, 380-82 (5th Cir. 2002). In *Haynes*, the defendant's lawyer conceded that his client was guilty of kidnapping, rape, and robbery over his objection. The Fifth Circuit declined to find prejudice *per se* because the lawyer nevertheless challenged the state's first-degree murder charges. *See id.* at 381-382. This

subject the prosecution's case to any meaningful adversarial testing, rendering his representation constitutionally deficient under *Cronic*.

C. The Louisiana Supreme Court misapplied this Court's holding in *Florida v. Nixon*.

The Louisiana Supreme Court determined that the facts of this case do not fit any of the situations identified in *Cronic*. Rather, the court determined that Mr. English's decision to concede Mr. McCoy's guilt was reasonable "in light of" of this Court's decision in *Nixon*. Pet.App. A-24. But this case is readily distinguishable from cases such as *Nixon* where the defendant fails to reject the lawyer's proposed strategy of conceding guilt.

In *Nixon*, though the lawyer had repeatedly consulted with his client about conceding guilt at trial, the client never responded to the lawyer's entreaties and neither consented to nor rejected the lawyer's proposed strategy. *See id.* at 181-82. The client's persistent silence in response to his lawyer's numerous attempts to communicate with him about the proposed strategy was material to the *Nixon* Court's holding; the majority focused explicitly and at some length on the importance of this fact. *See id.* at 179, 188-89, 192.

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decision fails in two respects. First, it fails to appreciate the significance of the client's objection to conceding guilt, a fact that resulted in a denial of the client's right to present a defense and a constructive denial of his right to counsel. *See supra* Part II.B, Part III.B. And second, the lawyer in *Haynes* presented a legally and factually available defense for his client, which Mr. English failed to do.

In contrast, Mr. McCoy explicitly and vigorously objected to Mr. English's guilt-based defense from the outset of his trial—a situation this Court declined to address in *Nixon*. This circumstance is significantly more egregious, and runs directly counter to the principle that a client maintains sole authority over the objectives of the representation. *See supra* Part I. The instant case thus presents facts that fall unambiguously outside the reach of *Nixon*'s holding.

When a client explicitly objects to conceding guilt and his lawyer nevertheless proceeds to do so, the Court's narrow holding in *Nixon* hardly forecloses the application of *Cronic*. Decisions by other state courts of last resort and lower federal courts confirm this conclusion. *Cooke v. State*, 977 A.2d 803, 847 (2009), is one such case that bears careful review. There, the Delaware Supreme Court held that *Nixon* does not apply in cases where "the defendant *adamantly objects* to counsel's proposed objective to concede guilt . . . and counsel proceeds with that objective anyway." The *Cooke* court determined that such a "breakdown in the attorney-client relationship" effectively deprives the defendant "of his Sixth Amendment right to make fundamental decisions concerning his case." *Id.* Other courts have similarly suggested that the Louisiana Supreme Court's interpretation of *Nixon* is at odds with the Court's holding in that case, which turned largely on the defendant's failure to object to counsel's strategic decisions. *See, e.g.*, *Murphy v. Bradshaw*, No. 1:03-CV-53, 2008 WL 1753241, at *6 n.6 (S.D. Ohio Apr. 11, 2008) (holding that *Nixon* did not apply "because it is clear that [the

defendant] actively opposed the strategy of conceding" guilt to the jury); *Steward v. Grace*, Civ. No. 04-3587, 2007 WL 2571448, at *8 n.80 (E.D. Pa. Aug. 20, 2007) (noting that *Nixon*'s holding is limited to the situation in which a lawyer consults with his client about conceding guilt and the client is unresponsive); *People v. Bergerud*, 223 P.3d 686, 699 n.11 (Colo. 2010) (holding that counsel cannot concede defendant's guilt to a crime over his express objection and noting that the defendant's "silence" in *Nixon* was "critical" to this Court's ruling in that case).

Furthermore, a significant body of pre-*Nixon* case law strongly suggests that the *Cronic* standard applies when defense counsel concedes guilt without the defendant's consent. *See, e.g.*, *State v. Anaya*, 592 A.2d 1142, 1147 (N.H. 1991) (finding prejudice *per se* where counsel urged jury to convict client of lesser-included offense despite his client's asserted innocence and refusal to plead to that offense); *State v. Harbison*, 337 S.E.2d 504, 507 (N.C. 1985) ("[W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed.").

The Louisiana Supreme Court's decision thus stretches this Court's narrow holding in *Nixon* beyond its limits. Far from a meaningless distinction, the difference between a lawyer choosing a course of action in the face of his client's non-response and doing so in direct contravention of that client's clear and explicit demands is the difference between making a reasonable choice based on

limited information and willful disregard of the duties arising from the attorney-client relationship. The Louisiana Supreme Court simply glosses over this crucial distinction to reach a conclusion that is incompatible with this Court's holding in *Nixon* as well as with the decisions of a number of other state and federal courts. It thus leaves similarly situated defendants with dramatically different sets of rights, cries out for Supreme Court review, and should not be allowed to stand.

CONCLUSION

This case demonstrates a complete breakdown in the system of representation meant to secure the fairness of American criminal justice. Mr. McCoy was denied the right to be the master of his own defense. His lawyer conceded and attempted to prove his guilt over Mr. McCoy's insistent and vigorous objection. It would be manifestly unjust for Mr. McCoy to be executed on that account. In Amicus's view, the only proper remedy is a new trial. The administrative costs of that procedure are minimal when compared to the price of sacrificing our constitutional principles and allowing Mr. McCoy to be executed in this case. This Court should grant the writ, allow Mr. McCoy an opportunity to serve as the master of his own defense, and clarify for the country the proper allocation of authority between lawyer and client. Our Constitution requires it.

Amicus respectfully requests that this Court grant the writ of certiorari and vacate Mr. McCoy's conviction and sentence.

Respectfully Submitted,

s/ Lawrence J. Fox

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RECORD
AND
BRIEFS

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IN THE
Supreme Court of the United States

ROBERT MCCOY, *Petitioner*,

v.

STATE OF LOUISIANA, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

AMICUS BRIEF OF THE LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE PROMISE OF JUSTICE INITIATIVE

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INTERESTS OF *AMICI CURIAE*[1]

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana.

LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions. LACDL acts as *amicus curiae* in cases where the rights of defendants are implicated. LACDL has filed amicus briefs concerning the role of counsel in capital cases as well as Louisiana's sordid history of race-based strikes.

The Promise of Justice Initiative (PJI) is a non-profit organization founded in New Orleans, Louisiana, to address issues of injustice. PJI, amongst other work, drafts policy papers and files amicus briefs in the state and federal courts, including this Court.

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[1] Pursuant to this Court's Rule 37, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified and have consented to the filing of this brief.

Amici have a distinct interest from petitioner and respondent in this case – denoting the intractable difficulty of ensuring autonomy of a criminal defendant while protecting the state's interest in a fair and reliable administration of punishment.

Amici also have a distinct perspective based upon our collective experience within Louisiana, on the operation of the rule of criminal procedure for jury strikes, and the impact that race plays in the administration of the justice system in Louisiana.

INTRODUCTION

The Louisiana Supreme Court's decision in *State v. McCoy* transforms the shield of the Sixth Amendment – the right "to have the assistance of counsel for his defense" – into the state's cudgel. It is the clarifying culmination of a series of cases in which the Louisiana Supreme Court has essentially countenanced the choice left capital defendants in Louisiana: accept a lawyer's admission of your guilt over express objection or represent yourself. LACDL believes that the Louisiana Supreme Court's decision in the underlying case threatens to "convert the appointment of counsel into a sham, and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel."[2]

The death penalty in Louisiana is despoiled by racial, geographic, and economic arbitrariness. See *Reed v. Louisiana*, 137 S. Ct. 787 (2017) (Breyer, J., dissenting from denial of certiorari); *Tucker v. Louisiana*, 136 S. Ct. 1801 (2016) (Breyer and Ginsburg, JJ., dissenting from denial of certiorari).

Within this landscape of arbitrariness, an uncomfortable number of death sentences in Louisiana are the result of defendants representing themselves or defendants expressly objecting to

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[2] *United States v. Cronic*, 466 U.S. 648, 665 (1984).

their lawyers' concessions of guilt. In addressing the fraught nature of attorney-client relationships, the Louisiana Supreme Court has further stacked the deck against defendants by adopting a set of rules that always militates in favor of the state and against the defendant.

But even more important than the technical effect of these rules – their application undermines, where it is needed most, the very core dignity and autonomy that the Constitution was enshrined to protect. LACDL believes in the Constitution, and in the checks and balances that the Constitution imposes on the governmental exercise of power. Nowhere is that check more important than in the government's exercise of the power to prosecute in a capital case.

LACDL firmly believes that the role of counsel is to protect the dignity and autonomy of each defendant; that where a client is competent to proceed, that it would never be appropriate to concede guilt over a client's objection; and further, that where a lawyer undertakes the strategy of conceding guilt in order to secure mitigation of sentence, that the lawyer would only do so with the consent and approval of his client. See Louisiana Administrative Code, Title 22, Part XV, Chapter 19 (Performance Standards for Criminal Defense Representation in Indigent Capital Cases); LAC 22:XV.1903(F)(6) ("Counsel shall not take action he

or she knows is inconsistent with the client's objectives of the representation. Counsel may not concede the client's guilt of the offense charged or a lesser included offense without first obtaining the consent of the client."); LAC 22:XV.1915(F)2. ("Counsel should not put on a non-viable defense but at the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt."); ABA Model Rules of Professional Conduct 1.2(a) (2007) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

Additionally, amici, and others, have brought to this Court's attention the historic efforts to disenfranchise African-American jurors, and the sordid role that race appears to play in the administration of justice, in jury selection, and particularly in administration of the death penalty in Louisiana. It is circumstantial evidence that a strike is race-based, where the state strikes a juror who the defendant also struck; but in Louisiana, this evidence cannot be considered. This issue is addressed in Section II of the amicus brief.

SUMMARY OF THE ARGUMENT

At its core, the Sixth Amendment right to the assistance of counsel promises to protect the dignity and autonomy of a person on trial by assisting him in making choices that are his to make when confronted with the authority of the state. *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Brookhart v. Janis*, 384 U.S. 1 (1966); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). This Court has long grappled with the dignity and autonomy owed a defendant facing criminal punishment. *Faretta v. California*, 422 U.S. 806 (1974); *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *United States v. Cronic*, 466 U.S. 648 (1984); *Florida v. Nixon*, 543 U.S. 175 (2004); *Indiana v. Edwards*, 54 U.S. 164 (2008).

In contrast to long-standing principles of autonomy, the rule adopted in *State v. McCoy* permits counsel to concede a defendant's guilt over his objection – giving each capital defendant the choice of accepting his lawyer's unilateral decision to admit guilt or representing himself.

Gideon guarantees nothing if the provision of a lawyer is predicated on this caveat: that if the client objects to the lawyer admitting his guilt – whether of the charged offense or a lesser included sentence – he can represent himself. Imagine, if Alabama had offered the *Powell* defendants counsel

with the caveat that it was counsel's choice to concede their guilt and seek the Court's leniency? Over the Scottsboro Youths' insistence of their innocence? But this is the rule in Louisiana – for both retained and appointed counsel.[3]

In *Faretta v. California*, the Court warned that "[i]n the long history of British criminal jurisprudence, there was only one tribunal that ever adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding. The tribunal was the Star Chamber." *Faretta v. California*, 422 U.S. 806, 821 (1975). But a system like Louisiana's – where the vast majority of capital defendants are indigent, represented by state selected counsel – risks perversion of fundamental rights where counsel is allowed to plead a defendant guilty over his objection.

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[3] The tension between the tactical desire of counsel to secure leniency at sentencing and a defendant's insistence on his right to a defense is not new. The question of autonomy and dignity is raised with unflinching clarity in the prosecution of John Brown for treason and attempted insurrection at Harpers Ferry. Brown's local counsel believed that there was an insanity defense, but Brown rejected it entirely. Robert M. De Witt, *The Life, Trial and Execution of Captain John Brown, Known as "Old Brown of Ossawatomie" With a Full Account of the Attempted Insurrection at Harpers Ferry (1859)*, available at http://www.civilwar.org/education/history/john-brown-150/witnesses-and-testimony.html?.

This case also illustrates Louisiana's miserly response to continued concerns regarding race-based peremptory strikes. These issues have been raised repeatedly. See *Williams v. Louisiana*, 136 S. Ct. 2156 (2016); *Dorsey v. Louisiana*, 566 U.S. 930 (2012) (cert denied); *Snyder v. Louisiana*, 552 U.S. 472 (2008). Despite this Court's admonition that courts have an obligation to "purge racial prejudice from the administration of justice,"[4] the Louisiana courts have adopted a *laissez fair* attitude. This Court should intervene.

ARGUMENT

This Court's foundational cases make clear that the right to counsel is essential to protect a defendant's rights when the "whole power of the state arrayed against him." *Powell v. Alabama*, 287 U.S. 45, 72 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that assistance of counsel is a fundamental right, essential to a fair trial). In *Faretta*, this Court clarified that the right to counsel was a shield, not a burden, that prioritized a defendant's autonomy. *Faretta v. California*, 422 U.S. 806, 820 (1974) ("To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment."). As the defendant will "bear the personal consequences of a conviction," his choices "must be honored out of

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[4] *Pena-Rodriguez v. Colorado*, 580 U.S. __, slip op. at 13 (2017).

'that respect for the individual which is the lifeblood of the law.'" *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S 337, 350-51 (1970)) (Brennan, J., concurring). A lawyer who is permitted to concede his client's guilt over the express objection of the defendant transforms the right to counsel into a sham. *United States v. Cronic*, 466 U.S. 648, 665 (1984).

As Justice Brennan explained, the right to the assistance of counsel for a citizen's defense

> is more than a right to have one's case presented competently and effectively. It is predicated on the view that the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by assisting him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be most effective for the defendant.

Jones v. Barnes, 463 U.S. 745, 759 (1983) (Brennan J., *dissenting*).

In an ongoing number of cases, this Court has made clear the role of counsel is to advance the client's autonomy and dignity. In *McKaskle v. Wiggins*, the Court accepted the role of an appointed lawyer as stand-by counsel because "[e]qually important, *all conflicts* between Wiggins

and counsel were resolved in Wiggins' favor." *McKaskle v. Wiggins*, 465 U.S. 168, 181 (1984) (emphasis added). And as Justice Scalia observed in *Gonzalez v. United States*, concurring:

> It is important to bear in mind that we are not speaking here of action taken by counsel over his client's objection – which would have the effect of revoking the agency with respect to the action in question.

Gonzalez v. United States, 553 U.S. 242, 254 (U.S. 2008) (Scalia, J., concurring).

This Court has never countenanced counsel as a noose around his client's case, conceding his guilt over his objection. Indeed in *Brookhart v. Janis*, the Court explained:

> His emphatic statement to the judge that "in no way am I pleading guilty" negatives any purpose on his part to agree to have his case tried on the basis of the State's proving a prima facie case ...
>
> Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can

> confront and cross-examine the witnesses against him.
>
> We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances.

Brookhart v. Janis, 384 U.S. 1, 7 (1966). Even under Justice Harlan's concurrence – in which he asserted that "a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval," Justice Harlan insisted that:

> Although it can be contended that the waiver here was nothing more than a tactical choice of this nature, I believe for federal constitutional purposes the procedure agreed to in this instance involved so significant a surrender of the rights normally incident to a trial that it amounted almost to a plea of guilty or nolo contendere. And I do not believe that under the Due Process Clause of the Fourteenth Amendment such a plea may be entered by counsel over his client's protest.

Brookhart v. Janis, 384 U.S. 1, 8-9 (1966) (Harlan, J., concurring).

The Louisiana Supreme Court has distorted these protections by undermining the values of

autonomy, dignity, and self-determination. Louisiana's approach has been to assess counsel's decision to override the authority of his client under the rubric of an ineffective assistance of counsel claim rather than assessing whether it is a capital defendant's personal choice.[5] The "dilution in a defendant's autonomy," creates a situation in which "a criminal defendant must put virtually all of his rights on the line – even those that are ostensibly reserved for his exclusive use – in order to exercise his Sixth Amendment right to counsel." Kimberly Helene Zelnick, *In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 Am. J. Crim. L. 363, 396 (2003).

The Louisiana Supreme Court's rulings also lack consistency. Capital defendants who insist on their innocence or who seek to put the government's case to "the crucible of meaningful adversarial testing,"[6] are left with the impossible choice of representing themselves or acquiescing to defense counsel who concede their guilt over their objections. On the other hand, under the guise of promoting autonomy, where a capital defendant

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[5] *But see* LAC 22:XV.1903(F)(6) ("Counsel shall not take action he or she knows is inconsistent with the client's objectives of the representation. Counsel may not concede the client's guilt of the offense charged or a lesser included offense without first obtaining the consent of the client.").

[6] *United States v. Cronic*, 466 U.S. 648, 656 (1984).

wishes to plead guilty and proceed to penalty,[7] or waived the right to present mitigating evidence at the penalty phase,[8] waived the right to appeal,[9] or even has volunteered for execution,[10] the Court has determined that defendants have a right to make a "knowing and intelligent waiver" at these stages, even when such a waiver would almost certainly ensure death. *Bordelon*, 33 So.3d 842 at 849-50.[11]

What can be distilled from Louisiana's approach is that when a question about a defendant's autonomy arises, Louisiana appears to resolve the question in favor of expediency, rather than autonomy or dignity. This Court's decision in *Florida v. Nixon*[12] surely did not anticipate a legal

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[7] *State v. Louviere*, 833 So. 2d 885 (La. 2002).

[8] *State v. Brown*, 0000-C-520401 (17th JDC) (2016).

[9] *State v. Bordelon*, 33 So.3d 842, 864 (La. 2009).

[10] *Id.*

[11] Louisiana codified this principle in 2010, when it amended the code of criminal procedure to require judges to inform defendants in capital cases "both in writing and orally of his this right to waive appeal upon appointment of appellate counsel." See Acts 2010, No. 674; La. C. Cr. P. Art. 912.1(A)(2). The law was introduced as a cost-saving measure.

[12] In *Florida v. Nixon*, 543 U.S. 175 (2004), defense counsel explained to defendant the strategy of conceding his guilt in order to avoid the death penalty, but Nixon was generally unresponsive, "never verbally approv[ing] or protest[ing] [defense counsel's] proposed strategy." *Id.* at 182. *Cf. State v. McCoy*, 2016 La. LEXIS 2107 (La. Oct. 19, 2016) (noting

regime wherein defendants (predominantly indigent defendants) were perpetually disadvantaged. Louisiana must ensure the same autonomy contemplated by the Court's Sixth Amendment protections in its approach to deciding cases relating to a concession of guilt over a defendant's objection. As Justice Brennan understood, "[t]he role of the defense lawyer should be above all to function as the instrument of the client's autonomy and dignity in all phases of the criminal process." *Jones v. Barnes*, 463 U.S. 745 (1983) (Brennan, J., dissenting).

While amici acknowledges that it might be easier and less expensive to operate a criminal justice system where a lawyer could – over his client's objections – admit his client's guilt and plea for leniency, the Constitution was not adopted for expedience sake, and this Court has recognized that such a system would be a sham.

I. In Louisiana, A Capital Defendant Has No Right To A Lawyer Who Will Insist On His Innocence.

The Louisiana Supreme Court has held that a capital defendant who insists upon his innocence must represent himself, or else allow his lawyer to admit his guilt over his objection.

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numerous disagreements on the record about defense strategy between defendant and defense counsel).

Louisiana's view of the role of counsel is as trustee rather than agent, as guardian ad lidem rather advocate. In this context, the Louisiana courts address the concession of guilt under a *Strickland v. Washington* analysis, rather than considering the autonomy of a defendant. Whatever the salutary benefits of a such a system, it is not ours. The apparent origins of Louisiana's rule is in *State v. Haynes*, where a Caddo Parish defense attorney conceded his client's guilt of second degree murder over the client's objection. *State v. Haynes*, 662 So. 2d 849, 852 (La.App. 2 Cir. Nov. 1, 1995) ("Haynes specifically asserts that he did not want his lawyers to argue that he was guilty of any of the accusations made by the State. Haynes notified the judge[13] of this preference, in plain language, during the opening statement of the defense.... Where the assertion that counsel was ineffective rests on actions of counsel pertaining to the incident proceedings, the *Strickland* test is applicable."). While the *Haynes* case has had a complicated subsequent history, the Fifth Circuit Court of Appeal has ultimately upheld the state court determination "that the Louisiana state court properly identified *Strickland* as the

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[13] The trial court judge in *Haynes*, who rejected the defense objection to his trial counsel's concession, is now a justice on the Louisiana Supreme Court. *Id.* ("Appealed from the First Judicial District Court for the Parish of Caddo, Louisiana. Trial Court No. 166,637. Honorable Scott J. Crichton Judge).

correct governing legal principle." *Haynes v. Cain*, 298 F.3d 375, 382 (5th Cir. 2002). In Louisiana, as such, the courts now countenance counsel's control over the decision to admit guilt.

a. In four capital appeals since 2000, the Louisiana Supreme Court has allowed defense counsel to concede his client's guilt over his express objection.

1. Eighteen-year-old Lamondre Tucker was forced to proceed with a lawyer who, over his objection, admitted his guilt of all the elements of first degree murder – while arguing to the jury to impose a lesser verdict. *State v. Tucker*, 181 So. 3d 590 (La. 2015) ("Defendant alleges he did not acquiesce in the decision of defense counsel to admit guilt of second degree murder and feticide in closing.").

2. Donald Leger was forced to accept counsel whose strategy was to admit his guilt over his objection. When Leger characterized his counsel as "bad", the Court informed him that he had a choice to accept counsel or represent himself. *State v. Leger*, 936 So. 2d 108, 148 (La. 2006) ("Mr. Leger: Your Honor, between choosing bad counsel and representing myself, I would have no choice other but to represent myself.").

3. Roy Bridgewater, a seventeen-year-old defendant facing capital charges who sought to insist on his innocence, was told that he must accept his current counsel's decision to admit guilt of second degree murder. *State v. Bridgewater*, 823 So. 2d 877, 895 (La. 2002).[14]

4. James Tyler was forced to proceed with counsel who, over his objection, admitted his guilt. See *Tyler v. Louisiana*, 137 S.Ct. 589 (2016) (cert denied) addressing *State v. Tyler*, 2013-0913 (La. 11/06/15), 181 So. 3d 678 (denying Tyler's post-conviction challenge to his trial counsel's concession of guilt over his express objection).

b. In four capital cases since 2000, capital defendants have been forced to represent themselves rather than acquiesce to a lawyer conceding their guilt.

There have been thirty-four death sentences since 2004 in Louisiana. In four of those cases, clients have represented themselves rather than accept their counsel's admission of guilt.

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[14] Bridgewater's sentence was set aside as a result of *Roper v. Simmons*, 543 U.S. 551 (2004).

1. Jeffrey Clark was given the choice of representing himself during his trial or enduring "counsels' approach of building jury trust by admitting participation in the attempted aggravated escape, thereby rendering a second degree murder conviction and life sentence more likely." *State v. Clark*, 2016 La. LEXIS 2512 (La. Dec. 19, 2016).

2. Anthony Bell was given the choice of representing himself or enduring a second lawyer with whom he had a breakdown in the relationship. *State v. Bell*, 53 So. 3d 437, 446 (La. 2010).

3. Laderick Campbell, who insisted on his innocence, was forced to represent himself or accept a lawyer who would concede his guilt. *State v. Campbell*, 983 So. 2d 810, 854 (La. 2008) ("As appointed defense counsel stated in the closed hearing, the state's evidence against the defendant was 'so strong' that the best result sought by even experienced counsel in the guilt phase of trial was a conviction of second degree murder.").

4. Greg Brown was forced to represent himself or accept a lawyer who had "abandoned [his] defense." *State v. Brown*, 907 So. 2d 1, 24 (La. 2005).

c. The Louisiana courts have permitted a capital defendant to expressly waive penalty phase claims or preclude defense counsel from presenting mitigating evidence.

1. In the only execution to occur since 2002, the Court permitted the defendant to waive the presentation of mitigating evidence. See *State v. Bordelon*, 33 So.3d 842, 864 (La. 2009) (allowing defendant to "limit his defense consistent with his wishes at the penalty phase of trial.") (quoting *State v. Felde*, 422 So.2d 370, 395 (La. 1982)). Bordelon was then permitted to waive his appeals and volunteer for execution.

2. David Brown was permitted to waive presentation of mitigating evidence, ensuring imposition of a death sentence. *State v. Brown*, 0000-C-520401 (17th JDC) (2016). His case is currently pending in the Louisiana courts.

3. The Louisiana Supreme Court permitted the mentally ill Terrance Carter to waive claims concerning his motion for new trial. *State v. Carter*, 84 So. 3d 499, 520 (La. 2012) ("Here, defendant did not express any desire to waive his right to counsel and to represent himself as in a Faretta situation, or even to serve fully as co-counsel, but rather, he sought only to withdraw a single post-trial motion that counsel wished to pursue."). Carter hung himself while on death row.

4. The Court upheld the decision of Chad Louviere, a capital defendant, to plead guilty and proceed to penalty phase. See *State v. Louviere*, 833 So. 2d 885, 894 (La. 2002) (determining that Faretta right includes right to plead guilty in capital case) (citing Barry J. Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty*, 65 ALB. L. REV. 181, 182-83 (2001)) (noting that a defendant's prerogative to plead guilty, even for crimes punishable by death, was described as early as the seventeenth century in England).

Rather than a principled and consistent commitment to the autonomy and dignity of capital defendants, the Louisiana Supreme Court has

adopted a set of rules that ameliorates always to the benefit of the state, and never to the defendant. Given the widespread challenges in Louisiana with regard to funding of indigent defense,[15] and the overwhelming obligations placed on defense counsel, a system that permits counsel to concede his client's guilt over the client's express objections risks the even sub-conscious incentivizing of expediency over rigor.

II. Louisiana Continues To Ignore The Principles of *Batson*.

This Court, in *Williams v. Louisiana*, remanded the case to the lower courts to consider what four members described as the operation of a "procedural rule that permits the trial court, rather than the prosecutor, to supply a race-neutral reason at Batson's second step if 'the court is satisfied that such reason is apparent from the voir dire examination of the juror.'" *Williams v. Louisiana*, 136 S. Ct. 2156 (2016) (Ginsburg, J.,

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[15] See *Boyer v. Louisiana*, 133 S. Ct. 1702, 1708 (2013) (Sotomayor, J. Breyer, J., Ginsburg, J., Kagan J., dissenting) (noting the "case appears to be illustrative of larger, systemic problems in Louisiana. The Louisiana Supreme Court has suggested on multiple occasions that the State's failure to provide funding for indigent defense contributes to extended pretrial detentions. . . . There is also empirical evidence supporting that assessment. ... . More broadly, the public defender system seems to be significantly understaffed.) (internal citations omitted).

Breyer J., Sotomayor, J., and Kagan, J., concurring) citing La. C. Cr. P. art. 795 (E). The concurrence explained that "Louisiana's rule, as the Louisiana Supreme Court has itself recognized, does not comply with this Court's *Batson* jurisprudence." *Id.* Justice Alito and Thomas dissented from the decision to grant, vacate, and remand in light of *Foster v. Chapman*, 136 S. Ct. 1737 (2016), because "It is, rather, a GVR in light of our 1986 decision in *Batson*." See *Id.*, citing *Flowers v. Mississippi*, 136 S. Ct. 2157 (2016) (Alito and Thomas, JJ., *dissenting*). Whether the appropriate remand relief is governed by *Batson* or *Foster*, the disregard of constitutional protections is clear.

Amici has filed a series of briefs in this Court denoting entrenched resistance to redressing racism in Louisiana. See *Dorsey v. Louisiana*, 566 U.S. 930 (2012) ("Motion of Louisiana Association of Criminal Defense Lawyers for leave to file a brief as amicus curiae granted. Petition for writ of certiorari to the Supreme Court of Louisiana denied."); *Dressner v. Louisiana*, Brief of LACDL, 2010 U.S. Briefs 752, 4-8 (U.S. Jan. 5, 2011) (noting the continued refusal of Louisiana courts to address *Batson* since the Court's decision in *Snyder v. Louisiana*); *Snyder v. Louisiana*, Brief of LACDL, 2006 U.S. Briefs 10119 (U.S. May 18, 2007); *Cf. Miller v. Louisiana*, 2012 U.S. Briefs 35706, 23 (U.S. Sept. 4, 2012) (noting connection between

Louisiana's non-unanimous jury rule, which originated during the all-white constitutional convention of 1898, and its resistance to following Batson).

In amici's brief in *Snyder*, LACDL noted that out of 178 cases involving *Batson* challenges, the Louisiana appellate courts had denied relief in all but four (and that in one of those cases granting *Batson* relief the Louisiana Supreme Court had reversed the finding of discrimination). The *Snyder* brief also noted that the Louisiana Supreme Court itself had denied relief in 30 of the 32 cases which raised *Batson* error on appeal – and that one of the two grants of relief involved a case where the prosecutor affirmatively explained that she struck a juror because he "was a single black male without children" and she did not want him relating to the defendant who she said was also a "single black male without children." *Snyder v. Louisiana*, Brief of LACDL, 2006 U.S. Briefs 10119 (U.S. May 18, 2007).

In the *Dressner* case, LACDL noted that the Louisiana Supreme Court had denied relief in every case after the *Snyder* remand – and that the appellate courts had denied relief in every case but one, which was subsequently reversed by the Louisiana Supreme Court. See *Dressner v. Louisiana*, Brief of LACDL, 2010 U.S. Briefs 752 (U.S. Jan. 5, 2011) (noting "no positive change in

the protection afforded by Batson to defendants in Louisiana.")

In the amicus brief in *Dorsey v. Louisiana*, LACDL observed that "Empirical research undertaken in several Louisiana jurisdictions has ... documented a significantly higher rate of prosecution peremptory challenges against African American jurors." See *Dorsey v. Louisiana*, Brief of LACDL.

In addition to "the procedural rule" identified in *Williams* which "permits the trial court, rather than the prosecutor, to supply a race-neutral reason at Batson's second step", Louisiana has an even more nefarious substantive rule that (as interpreted by the Louisiana courts) prevents trial court from considering evidence of race-based decision making in specific situations. See La. C Cr. P. art. 795 (D) ("The provisions of Paragraph C and this Paragraph shall not apply when both the state and the defense have exercised a challenge against the same juror."). In *State v. McCoy*, the Louisiana Supreme Court held that what might be the strongest evidence of race-based strikes could not be considered as relevant evidence of the State's racial animus because the prosecutor's strikes were exercised simultaneously to the defense. In Louisiana, thirty-three of the forty-two of the judicial districts have provisions for simultaneous strikes, and so in each of these

jurisdictions where a prosecutor strikes an African-American juror who is so pro-state or pro-death that the juror is also struck by the defense, this discrimination is deemed irrelevant to the trial court's assessment of the state's explanations for other strikes at the third stage of the *Batson* analysis.[16]

The Louisiana Supreme Court has continued the trend of rejecting challenges to race-based jury selection in all but the rarest case. The Court recently granted relief in *State v. Crawford*, noting *Williams v. Louisiana*, 136 S. Ct. 2156 (2016), observing: "Although defendant has not asked nor does this court here purport to decide the constitutionality of the last clause beginning with the word "unless" of La. C.Cr.P. art. 795(C) per se, the continued scrutiny given to that article should not go unnoticed by the bench and bar of this state." *State v. Crawford*, 2016 La. Lexis 2376 (2016).[17]

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[16] See Louisiana Supreme Court Rules, District Court Rule Title III, Chapter 19 Appendix (Simultaneous Peremptory Challenges).

[17] Though *Crawford* was ultimately decided on *Batson* grounds, two justices believed that the State had not even met its burden under *Jackson v. Virginia*, 443 U.S. 307 (1979), in the case, as "the most that Dr. Traylor and Caddo Parish Coroner Dr. Todd Thoma could opine about these injuries is

After imposing a rule that excludes direct evidence of racial animus, the Louisiana Supreme Court then rejected post-trial statistical evidence of race based strikes in the parish.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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that this bruising was "consistent" with smothering." *Id.* (Knoll, J., Johnson C.J., concurring).

No. 16-8255

IN THE

Supreme Court of the United States

ROBERT MCCOY,
Petitioner,

v.

LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

JOINT APPENDIX
VOLUME I OF II (JA1-JA431)

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IN THE
SUPREME COURT OF LOUISIANA

No. 2014-KA-1449

STATE OF LOUISIANA,

Plaintiff,

v.

ROBERT LEROY MCCOY

Defendant.

Filed October 19, 2016
[218 So. 3d 535]

ON APPEAL FROM THE TWENTY–SIXTH
JUDICIAL DISTRICT COURT FOR THE PARISH OF BOSSIER

OPINION

HUGHES, J.

This is a direct appeal under LSA–Const. Art. V, § 5(D)1[1] by the defendant, Robert LeRoy McCoy. The defendant was indicted by a Caddo Parish grand jury, on May 29, 2008, on three counts of first degree murder, for the murders of Willie Ray Young, Christine Colston Young, and Gregory Lee Colston, in violation of LSA–R.S. 14:30. After a trial, the jury found the defendant guilty as charged on all three counts. At the conclusion

[1] Article V, Section 5(D) provides, in pertinent part: "[A] case shall be appealable to the supreme court if ... the defendant has been convicted of a capital offense and a penalty of death actually has been imposed."

of the penalty phase of the trial, the jury unanimously returned a verdict of death on all three counts, finding the aggravating circumstance that the defendant knowingly created a risk of death or great bodily harm to more than one person. The trial court sentenced the defendant to death, in accordance with the jury's determination. The defendant now appeals his convictions and sentences, raising sixteen assignments of error. After a thorough review of the law and the evidence, we find no merit in any of the assignments of error. Therefore, we affirm the defendant's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

Christine Colston Young and her husband, Willie Ray Young, were shot and killed at their home at 19 Grace Lane in Bossier City, Louisiana, on May 5, 2008; Christine's grandson, Gregory Lee Colston, was also shot and later died. Gregory had recently come to live with his grandparents so that he could finish his senior year at a local high school, after his mother, Yolanda Colston, had separated from the defendant earlier in the Spring of 2008 and following an incident of domestic abuse battery in April 2008.[2] On advice of law enforcement, Yolanda and her infant daughter had gone into protective custody out-of-state, and a warrant was issued, on April 16, 2008, for the defendant's arrest for aggravated battery, by Detective Kevin Humphrey. In April and May, the defendant had evaded arrest under the warrant by failing to show up for work at his place

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[2] At the penalty phase, Yolanda Colston testified that, during the incident of domestic abuse, the defendant pinned her down on the bed at knifepoint and threatened to kill her and then kill himself.

of employment. The defendant had also traveled to Oakland, California, where his half-brother resided, but his cell phone records indicated that he returned to Bossier City on or about May 4, 2008, as calls were initiated from the defendant's cell phone in Bossier and Caddo Parishes on the day of, and the day after, the murders.

On the night of May 5, 2008 a 911 call was placed from 19 Grace Lane, in which Christine Colston Young could be heard screaming, "She ain't here, Robert ... I don't know where she is. The detectives have her. Talk to the detectives. She ain't in there, Robert." A gunshot was then heard on the 911 tape and the call was disconnected.

The Bossier City Police Department ("BCPD") broadcast that a disengaged 911 call came from 19 Grace Lane, which was heard by Detective Humphrey, who immediately recognized the address as the residence of Yolanda Colston's parents. However, Detective Humphrey was working a security detail at a local store, and so he notified the first responders, via police radio, that he had an arrest warrant for Robert McCoy, whose estranged wife's mother resided at 19 Grace Lane. Detective Humphrey cautioned the first responders to be on the lookout for a white four-door Kia, which he believed was driven by Robert McCoy.

Officer Kary Szyska responded that he was in the vicinity, approaching 19 Grace Lane, and that he saw a white Kia fleeing from the scene, which was recorded on the officer's dashboard video camera. Officer Szyska made a U-turn and gave chase. On a dead-end street within a few blocks of the victims' home, the video showed a black male matching the defendant's general

physical description jump out of the driver's side of the Kia, scale a nearby fence, and run across I–20.

Meanwhile, Detective Humphrey called the victims' home and, receiving no answer, he drove there, arriving with other officers to find the front door ajar. Upon entering, the officers discovered fifty-five-year-old Christine Colston Young and fifty-year-old Willie Young, who was a cousin of the defendant, dead at the scene. Seventeen-year-old Gregory Colston was found gravely injured, but alive, and he was transported to the hospital, where he died a short time later. All three victims suffered a single gunshot wound to the head, fired from close range.

Since the abandoned Kia had a temporary license plate, the police ran the VIN (vehicle identification number) and found that it was registered to Robert and Yolanda McCoy. The police impounded the vehicle and searched the interior. There was a white cordless (landline) telephone on the driver's seat, and the charger/cradle for the cordless handset was found inside the victims' residence. The serial and model numbers on the handset found in the defendant's Kia matched that on charger/cradle found in the victims' home, confirming that the phone used by Christine Colston Young to call 911 was the phone found in the defendant's abandoned vehicle immediately after the murders.

Also found in the center console of the abandoned Kia was a Walmart bag with a box of .380 caliber ammunition. Inside the Walmart bag was a cash receipt from earlier that same day (at 16:55, or 4:55 p.m., on May 5, 2008), for the purchase of the ammunition. The police obtained video surveillance footage from Walmart, generated at the time of the purchase on the receipt, which showed an individual matching the de-

fendant's physical description purchasing ammunition while wearing a black "do-rag" on this head.[3]

A manhunt began for the defendant involving the BCPD, the U.S. Marshall's Office, and the FBI. The police began with the defendant's cell phone records.[4] They noticed he had been repeatedly calling a number in Oakland, California. Detective Humphrey testified that the last ping on the cell phone being used by the defendant occurred in Fort Smith, Arkansas, and then the phone went dead. At that point, the police subpoenaed the phone records for the Oakland number the defendant had been calling, and as soon as the defendant's phone was no longer being used, an Arkansas cell phone began calling the Oakland number. The police called the Arkansas cell phone number and a truck driver answered.[5] The police asked the truck driver if a

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[3] A witness, Sharon Moore, testified that she had a relationship with the defendant in 2008, and that, on May 5, 2008, he asked her to buy some bullets for him because he was working on the railroad in some bad neighborhoods. The defendant also tried to borrow money from Ms. Moore to buy the bullets, but she did not give him any money. Ms. Moore testified that she accompanied the defendant to buy the bullets at the Walmart in Minden.

[4] When the defendant abandoned the white Kia, he left a black bag with a Mason insignia on the front, in the back seat, which contained his personal cell phone. The police ascertained that, after the murders and after abandoning his cell phone in the Kia, the defendant began using his sister's cell phone. The defendant took his sister's cell phone on his four-day flight from justice, which law enforcement traced to ultimately track down the defendant. The black Mason bag and its contents, including the defendant's abandoned cell phone, were not admitted at trial for lack of evidentiary value and that property was retained by the BCPD.

[5] On first obtaining the name and address of the Arkansas cell phone's owner (an elderly lady living in Arkansas), law enforce-

black male named Robert was riding in the eighteen-wheeler with him. The driver replied, "[H]e was, but he's not now," relating that Robert had gotten into another eighteen-wheeler, which had been directly behind him at a weigh station in Spokane, Washington. The Arkansas truck driver told the police that he had picked Robert up in East Texas,[6] and Robert had borrowed his cell phone to make some calls after the battery went dead on his phone. The Arkansas truck driver disclosed that he and the second truck driver, with whom the defendant thereafter hitched a ride, had been issued tickets at the Spokane weigh station. The police contacted the weigh station and learned that the truck the defendant was traveling in was a Swift Transportation eighteen-wheeler. The police contacted Swift Transportation and learned that the eighteen-wheeler in which the defendant was traveling was bound for Oakland, California. Through GPS tracking, they located the Swift truck in Lewiston, Idaho, where it was making a warehouse pick-up.

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ment contacted her to ascertain that she was safe, and she informed law enforcement that the cell phone was used by her husband, who was a truck driver.

[6] The police learned that after the murders, the defendant's brother, Spartacus McCoy, had given him a ride to Lindale, Texas. Spartacus was initially charged as an accessory to first degree murder. He gave a statement to police, but by the time of trial, Spartacus was deceased. The State did not oppose the defense motion in limine to exclude that statement and it was not introduced at trial. According to the PSI prepared by the Probation and Parole Division following the verdicts in this case, the police also charged another brother of the defendant, Carlos McCoy, as an accessory after the fact. Carlos McCoy pled not guilty, and the case was continued without date on June 1, 2009.

The BCPD communicated to the Lewiston Police Department ("LPD") that a murder suspect was a passenger in a Swift eighteen-wheeler in their jurisdiction and gave the location. On May 9, 2008 the LPD stopped the eighteen-wheeler in Lewiston, Idaho, and they arrested the defendant.[7] The defendant and the truck driver were the only occupants of the eighteen-wheeler, and the driver was not suspected of, or charged with, any crimes. The police searched the eighteen-wheeler, and found a loaded, silver handgun on the floorboard behind the passenger seat where the defendant had been seated. The weapon was not in a holster or bag, and the safety was not on.[8] The truck driver denied having a gun or any knowledge of a gun being in his truck. The LPD also seized from the defendant a cell phone and his wallet, which contained a pay stub, a birth certificate, a social security card, identification cards, insurance cards, and credit cards, all in the name of Robert McCoy, though the defendant had given the name of "Vance McCoy."

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[7] A video dashboard camera, mounted in one of the LPD patrol cars showed the defendant being removed from the eighteen-wheeler, placed under arrest, and put in a patrol car. At that time, the defendant was wearing a black "do-rag."

[8] The gun seized from the eighteen-wheeler in which the defendant was traveling was a .380 caliber Tanfoglio pistol, model Tital II, serial number EB06206. That gun was admitted into evidence at trial, as State Exhibit Number 74 ("S–74"). A firearms examiner tested the weapon and the evidence, and conclusively determined that the bullet that killed Willie Young, which was removed from his brain during autopsy, was fired from S–74, and all four cartridge casings found at the scene at 19 Grace Lane were conclusively determined to have been fired from S–74. A forensic pathologist testified that Christine Colston Young and Gregory Colston suffered exit wounds, meaning the bullets that killed them passed through their skulls and exited.

On May 12, 2008, while awaiting extradition to Louisiana, the defendant unsuccessfully tried to hang himself with a bed sheet. The defendant was returned to Louisiana on May 14, 2008.

On May 15, 2008 the defendant appeared, by video, at a 72–hour hearing, and the court appointed the Indigent Defender Board to represent him. On May 29, 2008 a Bossier Parish grand jury indicted the defendant for the May 5, 2008 first degree murders of Christine Colston Young, Willie Ray Young, and Gregory Lee Colston, alleging in each instance a violation of LSA–R.S. 14:30(A)(3) (murder when "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person"). On June 17, 2008 the defendant entered a plea of not guilty to the charges at the formal arraignment.

On July 1, 2008 the State gave its notice of intent to seek the death penalty against the defendant. Thereafter, the defense moved for the appointment of a sanity commission to evaluate the defendant's mental capacity to understand the proceedings against him and to assist in his defense. The trial court ordered Dr. Richard Williams, a psychiatrist, and Dr. Mark Vigen, a clinical psychologist, to examine the defendant, which they did and by agreement submitted their findings by report to the court. At a hearing held on November 14, 2008 the trial court noted that both experts found the defendant competent to stand trial.[9]

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[9] As discussed hereinafter, the defendant was not found to suffer from mental retardation or intellectual disability, as defined by LSA–C.Cr.P. art. 905.5.1 ("[N]o person with an intellectual disability shall be subjected to a sentence of death ...."). The sanity commission experts evaluated the defendant's full scale IQ at 89, his verbal IQ at 95, and his performance IQ at 83.

Thereafter, both the State and the defense filed motions for discovery and inspection, and the defendant filed a variety of pro se motions into the record, including subpoena requests for a number of witnesses.[10] The State filed motions to quash the defendant's pro se subpoena requests, asserting that the testimony of the individuals, sought by the defendant to be subpoenaed, had no evidentiary value or relevance to contribute to the case and that the defendant's actions were "meant to harass and unduly delay this matter."

On December 6, 2009 the defendant wrote to the trial court advising that a conflict of interest had arisen between him and the public defender's office, and he sought to represent himself until additional counsel could be retained and enrolled.[11] On January 12, 2010

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[10] The group of individuals the defendant sought to have subpoenaed included, among others: a Caddo Parish juvenile court judge, an FBI agent, and Senator David Vitter. The defendant also sought to subpoena a newspaper columnist, Loresha Wilson, who wrote several articles in the local newspaper about the defendant and the triple homicide. The trial court subsequently quashed the defendant's pro se subpoenas issued to Senator Vitter and to the local newspaper columnist because they were not filed in proper form.

[11] In his pro se filing, the defendant stated that he was representing himself, after a breakdown in his relationship with the public defender's office on April 16, 2009, when attorney Craig Forsythe and "private investigator Shanks" came to the jail to meet with him. The defendant asserted that Mr. Forsythe "cursed [him] like a dog!" During a subsequent April 24, 2009 meeting with Mr. Forsythe and Mr. Shanks, the defendant indicated that he tried to discuss information with them about his alibi defense, his whereabouts, and the subpoenas he wanted issued, which information he stated that he had already given to his public defender, Pam Smart, and Mr. Shanks stated to the defendant that they had not received any information about subpoenaing those witnesses. The defendant said he then stated to Mr. Forsythe and

the trial court held a hearing, initially slated to address the motion to quash subpoenas, but after the defendant announced to the court that he had a conflict of interest with the public defender's office and that his family would be hiring an attorney, the trial judge recessed the hearing until the counsel issue could be resolved.

On February 11, 2010 after the trial judge gave the defendant a full recitation of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the defendant waived those rights and asserted his right to represent himself under *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975). After interrogating the defendant, the trial judge ascertained that the defendant merely sought to represent himself "until my [retained] counsel enrolls next month." The defendant assured the judge that even if counsel did not enroll, he would still be prepared to go to trial on the previously set date of May 24, 2010.

On March 1, 2010 Larry English filed a motion to enroll as counsel for the defendant, and Mr. English appeared in open court two days later to formally enroll. Mr. English admitted to the court that he was not certified to try death penalty cases but that he had made calls to board certified lawyers in order to assemble a legal team to try the case. The trial judge informed the defendant that his new attorney was not certified in death penalty cases, and the defendant acknowledged that he understood that and still wished to go forward

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Mr. Shanks, "I told them that's the exact reason why I don't trust them!" Whereupon, the defendant stated that Mr. Forsythe began to curse him, and he (the defendant) "dismissed [himself] from the meeting." The defendant stated that he reported the incident to "Chief Defender Phillips" and "informed him of the incident and dismissal of counsel."

with Mr. English as his attorney. Then Mr. English filed a motion to continue the trial, which the judge denied because the defendant had filed a pro se motion for speedy trial on January 13, 2010 and the case had already been set for trial at least once before. Thereafter, the trial judge relieved the public defender's office from its representation of the defendant.

On April 16, 2010 Mr. English took a writ to the Second Circuit on the trial court's denial of his motion to continue. While that writ application was pending, the trial court held an additional hearing, on April 23, 2010, on the defendant's motion to continue, at which time Mr. English reported that he was "having trouble ... putting together a legal team to represent Mr. McCoy because nobody wants to step into a capital murder case that they've got to go to trial on within such a short period .... I'm still not up to speed or nearly ready to undertake the representation of Mr. McCoy." After the defendant and counsel assured the trial judge that they were withdrawing the defendant's speedy trial motion, the judge reset the trial date to February 7, 2011, which he deemed "a hard ... date." The trial judge also warned counsel: "Mr. English, I want you to understand that if I grant this continuance you will not be allowed to withdraw." Subsequently, the Second Circuit noted that the trial court had granted the defendant's motion to continue, and the writ was withdrawn. *See State v. McCoy*, 45,623 (La. App. 2 Cir. 5/20/10).

On March 12, 2010 the State filed its notice of intent to use evidence of other acts and/or crimes at trial, pursuant to LSA–C.Cr.P. art. 720 and LSA–C.E. art. 404(B). Specifically, the State's notice covered "[a]ll evidence from the criminal investigation of the incident that occurred on or about the 2nd day of April, 2008

concerning Yolanda Colston." The defense responded by filing a motion in limine to exclude "any prior bad acts" of the defendant from trial. The parties argued the motions before the court on November 16, 2010, with the State urging that the issue of the defendant's aggravated battery against Yolanda Colston constituted res gestae because "that's what caused [the defendant] to come into contact with these victims on that particular night." The trial judge agreed and granted the State's motion to admit other crimes evidence. The defense counsel noticed his intent to seek writs, which were subsequently denied by the appellate court "on the showing made." *See State v. McCoy*, 46,266 (La. App. 2 Cir. 1/6/11) (unpublished).

On December 14, 2010 Mr. English filed a motion requesting the trial court to declare the defendant indigent, for purposes of obtaining funds through the Louisiana Public Defender Board, so that the defense could hire a mitigation expert and investigator, a social worker, and a mental health expert, which was heard by the trial court on January 4, 2011. Mr. English disclosed to the court that mitigation experts were necessary should there be a guilty verdict in the case, but the defendant disagreed with that defense strategy. Mr. English further informed the court that the defendant had directed him not to proceed with the motion to declare him indigent, but Mr. English stated that to follow the defendant's directive would not be in the defendant's best interest, opining that his client was suffering from "severe mental and emotional issues that ha[ve] an impact upon this case." Mr. English asked the trial court to "order that Mr. McCoy submit to the experts that are required in a capital murder case."

In addition, numerous motions filed by the defendant, pro se, were addressed during the January 4, 2011

hearing, concerning which Mr. English stated: "I do not adopt those motions. I've asked [the defendant] not to file those motions .... I do not believe it's in his best interest to do so .... [T]here may be some statements or documents in there that I believe ... may be detrimental to his case given the overwhelming ... evidence that is against him." Mr. English also indicated that he was satisfied with the discovery response by the State, which he said had "provided us with all of the evidence in this case." The district attorney confirmed that the State had given "open file" discovery to the defense. At the conclusion of the hearing, the defendant acquiesced in withdrawing his various pro se motions.

Thereafter, the State realized that declaring the defendant indigent triggered Rules of the Supreme Court of Louisiana, Rule XXXI ("In any capital case in which a defendant is found to be indigent, the court shall appoint no less than two attorneys to represent the defendant ....") and that since Mr. English's enrollment there had been only one attorney representing the defendant.[12] Accordingly, on January 24, 2011, the State filed a "Motion to Determine Waiver of Co–Counsel," requesting a contradictory hearing "to determine defendant's waiver of co-counsel at defendant's capital murder trial." On that same day, the trial court held a hearing on the motion, during which the district attorney stated that he filed the motion to "get Mr. English and/or Mr. McCoy's position." Mr. English advised the court that although another attorney, James Gray, had been advising him about the case, neither

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[12] Mr. English clarified to the court that, despite having filed a motion in the matter, attorney Carlos Prudhomme had "not been involved in the case" and would "not be helping ... handle the trial."

Mr. Gray nor any other attorney would be participating in the trial of the case, and he was comfortable trying the case single-handedly.[13] The trial judge questioned the defendant about the issue, and the defendant informed the court that, even though Mr. English was not capital certified, he waived the Rule XXXI two-attorney representation standard because he did not want to have the public defender's office reappointed to his case. Also during the January 24, 2011 hearing, Mr. English orally requested a continuance of the February 7, 2011 trial date to further develop mitigation evidence. The trial court denied the defense motion to continue the trial date, and the defense thereafter filed an application for review with the appellate court.

Initially, the appellate court denied the writ application because the defense "failed to provide this Court with any documentation that the motion to continue was ever filed or ruled upon by the trial court." *State v. McCoy*, 46,387 (La. App. 2 Cir. 2/1/11) (unpublished). However, on the following day, the appellate court issued a stay of the proceedings and, thereafter, issued a ruling granting the writ, lifting the stay, and remanding the case with instructions. *State v. McCoy*, 46,387 La. App. 2 Cir. 2/2/11) (unpublished); *State v. McCoy*, 46,394 (La. App. 2 Cir. 2/3/11) (unpublished). In its ruling, the appellate court expressed concern that the defendant was proceeding to trial with only one defense attorney, who was not certified as qualified to defend capital cases. *Id.*, 46,394 at p. 2. The appellate court granted the writ and remanded the case back to the

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[13] Mr. English admitted to the trial court that, while he anticipated trying the case alone, he had relied on both Pam Smart and James Gray of the Public Defender's Office for assistance in preparing for trial.

trial court to grant the defendant a continuance of the trial date,[14] directing the trial court to also "ensure that Mr. McCoy is, or has been, fully apprised on the record of the benefits of having two capital-defense qualified attorneys and that McCoy has knowingly and intelligently waived same." *Id.*, 46,394 at p. 3.

In response to the appellate court's February 3, 2011 ruling, the State immediately filed a "Motion to Appoint Additional Counsel," and, on the same day, the trial court held a hearing on the motion to address the concerns voiced by the appellate court. In addition to the district attorney and defense counsel of record, a representative from the local public defender's office, Randall Fish, was present at the February 3, 2011 trial court hearing, during which the court and the parties discussed whether the defendant could continue to be represented by retained counsel and also be entitled to the appointment of two capital-qualified attorneys through the public defender's office. The defendant unequivocally declined assistance from the public defender's office, stating: "I don't want the Court to put counsel on me ... that I don't want." The trial judge and the district attorney questioned the defendant as to his waiver of counsel under Rule XXXI, and the defendant

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[14] In support of his argument that a continuance of the trial date was needed, defense counsel submitted to the appellate court documentation from the mitigation experts, containing "an explanation from the experts of the time required to conduct a meaningful study suitable for use as evidence in a criminal trial," which the appellate court recognized had not been submitted to the trial court. *Id.*, 46,394 at p. 2. The appellate court noted that, at the time of the January 24, 2011 hearing, "[d]espite a trial date approximately one month away and despite a nearly year-old promise [by Mr. English] to 'assemble a team,' evidently no work had been done in this capital case to develop this evidence." *Id.*

affirmed that he voluntarily waived the public defender's office being appointed as co-counsel in his case. The defendant stated that he was "totally opposed to that and most of all ... I choose not to be strong armed to take a public defender's aspect of secondary counsel when that's totally against my wishes." Based on the defendant's repeated assurances that he was knowingly and voluntarily waiving the appointment of additional counsel, the trial judge denied the State's motion for appointment of a second trial counsel, and a trial date of July 28, 2011 was set.

On July 12, 2011 the trial court held a hearing to address the State's motion for discovery, which requested written notice from the defendant of his intention to offer a defense of alibi, and the State's motion to quash various subpoena requests issued by the defendant in proper person. As to the former, Mr. English informed the court that "[w]e have no alibi evidence in this case," notwithstanding the defendant's pro se notice of intent to offer an alibi. As to the defendant's pro se subpoena requests, the State asserted they were not in proper form, and Mr. English replied, "I do not adopt any of the subpoenas that Mr. McCoy has filed. He has done that against my advice." The trial court did not quash the pro se subpoenas on that date, but reserved his decision until a later date.

On July 26, 2011 two days before the trial was slated to begin, the court held a hearing in which Mr. English reported that he learned over the weekend of the defendant's "intention to terminate my services." After the trial judge fully advised the defendant of his rights under *Miranda*, the defendant disclosed that Mr. English would not be his lawyer going forward. The trial judge informed the defendant, "[T]hat's my determination at this point." The defendant claimed that his par-

ents had retained two new attorneys, although those attorneys were not in court at the July 26th hearing. The defendant asserted that Mr. English has been "trying to ... make me cop out to three counts of first degree murder. Didn't want me to go to trial." Mr. English informed the court that he and the defendant had an irrevocable disagreement as to the trial strategy. Relying on *State v. Bridgewater*, the trial judge denied the defendant's motion to substitute counsel as untimely, given that the lawyers the defendant was seeking to enroll were not present in court that day and trial was slated to commence in two days. *See State v. Bridgewater*, 00–1529 (La. 1/15/02), 823 So.2d 877, *on rehearing*, 00–1529 (La. 6/21/02), 823 So.2d 877, 909, *cert. denied*, 537 U.S. 1227, 123 S.Ct. 1266, 154 L.Ed.2d 1089 (2003). Accordingly, the trial judge ordered Mr. English to remain counsel of record. Moments after the trial court's ruling that the defendant's request to discharge counsel was untimely, the defendant made a one-sentence invocation of his right to self-represent, which the court disposed of as untimely under *State v. Bridgewater*.

Voir dire commenced on July 28, 2011, and jury selection of twelve jurors and two alternate jurors was completed on August 2, 2011. Trial on the merits commenced on August 3, 2011, and the State gave its opening statement. Thereafter, Mr. English gave an opening statement in which he conceded guilt, stating, "I'm telling you Mr. McCoy committed these crimes," but he asserted that the defendant was suffering "from serious emotional issues" that inhibit his ability "to function in society and to make rational decisions." Accordingly, Mr. English urged the jury to consider this case in terms of a second degree murder trial.

The State presented its case through the testimony of eleven witnesses and 100 exhibits before resting its

case-in-chief. On August 4, 2011 Mr. English announced to the court that, against the advice of counsel and warnings of a possible perjury indictment, the defendant had elected to testify. The trial judge advised the defendant of his rights under *Miranda*, and the defendant acknowledged that he understood those rights and wished to testify. Thereafter, the defendant testified to his alibi defense and sought to refute the State's evidence with his theories of a vast conspiracy that landed him on trial for his life.[15] The district attorney

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[15] At trial, the defendant denied committing an aggravated battery upon his estranged wife, Yolanda Colston. He also denied owning a gun and suggested that the Idaho police had planted the murder weapon in the eighteen-wheeler as part of a conspiracy with BCPD Detective Humphrey. The defendant further denied spending the night with Sharon Moore the night before the murders or that he asked her for money to buy bullets, suggesting that the district attorney had "concocted that story." The defendant testified that he went out-of-state on April 21, 2008, after Officers Joshua Bounds and Richard McGee came to his house and beat him in the face with a weapon. The defendant stated that those officers stole his car on April 18, 2008, so he could not have been the person seen running from the white Kia on the police cruiser dashcam video recorded on May 5, 2008. The defendant claimed that he never returned to Bossier City. He explained that he had let his good friend, Robert Evans, a truck driver, use his cell phone, and it was Robert Evans who was calling Sharon Moore around the time of the murders because he had "offered" Sharon Moore to Mr. Evans, although "she didn't think highly of that." The defendant further claimed that Detective Humphrey threatened to kill him because he was going to expose corruption in the police department involving Officers Bounds and McGee, all of whom the defendant described as being "very strongly in drugs." The defendant further testified that the "Robert" that Christine Colston Young was screaming at on the 911 tape was really Robert Thomas, a drug-dealing cop who owned White Automotive off Barksdale. The defendant theorized that Mr. Thomas killed the victims because Willie Young was transporting drugs for them and owed them a debt of $2,500. The defendant claimed that Rob-

cross-examined the defendant, after which the defense rested its case. After deliberations on August 4, 2011, the jury returned a unanimous verdict of guilty as charged on all three counts.

The penalty phase was held on August 5, 2011. The State called five victim impact witnesses: (1) Yolanda Colston (mother of victim Gregory Colston, and daughter/step-daughter of victims Christine Colston Young and Willie Young); (2) Lorenzo Evans (friend of Gregory Colston); (3) Kent Falting (teacher and coach of Gregory Colston); (4) Eric Davis (son of Christine Colston Young); and (5) Pauline Miles (sister of Willie Young). Thereafter, the defense called one mitigation expert, Dr. Mark Vigen.[16] After deliberation, the jury returned a verdict recommending the sentence of death on all three counts, finding that the State proved one of

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ert Evans hitched a ride with the truckers, not him. The defendant stated that he was in Houston on the night of the murders, and the reason that calls were being initiated from his cell phone in Bossier and Caddo Parishes on the day of, and day after, the murders was because Mr. Evans had his cell phone. The defendant denied ever attempting to commit suicide. He claimed that the officers made that up to cover-up the fact that they had beaten him. The defendant testified that he had been unable to subpoena any of his witnesses, relating that he had wanted to call to the stand FBI Agent J.T. Coleman, who investigated alleged drug-dealing activities of Officers Richard McGee and Robert Thomas. He said that he also wanted Senator David Vitter to be subpoenaed for trial because "I know Mr. David Vitter personally and [he] knows everything that goes on with me." The defendant testified that those witnesses would have corroborated all that he was saying.

[16] Dr. Vigen testified that the defendant "is one of those people that can lie to themselves so extensively and for such a long period of time that they ultimately end up believing what the lie is."

the three aggravating circumstances advanced,[17] namely that the offender knowingly created risk of death or great bodily harm to more than one person.

On December 6, 2011 attorneys from the Louisiana Capital Assistance Center appeared before the trial court and filed a motion for new trial and a motion in arrest of judgment on the defendant's behalf. Appellate counsel filed a supplemental motion for new trial on January 17, 2012. The trial court held a hearing on the defendant's post-verdict motions on January 23, 2012, and at the conclusion, denied the motion for new trial. The defendant waived delays, and the trial court formally imposed the sentence of death in accordance with the jury's verdict.

On August 8, 2012 appellate counsel filed a "Second Motion for New Trial." The trial court subsequently ruled that the second motion for new trial was untimely filed. A writ application was denied by the appellate court "on the showing made." *State v. McCoy*, 48,083 (La. App. 2 Cir. 1/17/13) (unpublished). This court also denied review. *State v. McCoy*, 13–0400 (La. 4/5/13), 110 So.3d 1067.

The defendant now appeals his convictions and death sentences on the basis of sixteen assignments of error: (1) the defendant's right to counsel of choice was violated when the trial court denied his request to discharge and substitute trial counsel prior to trial; (2) the

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[17] The State relied on three aggravating circumstances, pursuant to LSA–C.Cr.P. art. 905.4(A)(1) ("The offender was engaged in the perpetration or attempted perpetration of ... aggravated burglary ...."); LSA–C.Cr.P. art. 905.4(A)(4) ("The offender knowingly created a risk of death or great bodily harm to more than one person."); and LSA–C.Cr.P. art. 905.4(A)(7) ("The offense was committed in an especially heinous, atrocious or cruel manner.").

trial court erred in denying the defendant's right to self-representation; (3) the trial court erred in failing to conduct a hearing and grant the defendant's request for substitution of counsel on his showing that trial counsel was incompetent or otherwise unable to furnish adequate representation; (4) the trial court erred in ruling that trial counsel, rather than the defendant, could decide whether to concede guilt of murder; (5) the defendant's right to counsel was denied when he was involuntarily represented by trial counsel who conceded his guilt against his express instructions and entirely failed to adversarially test the State's case; (6) the defendant's right to conflict-free counsel was violated when his trial counsel actively represented interests contrary to the expressed interests and objectives of the defendant; (7) the defendant's rights to compulsory process, to an impartial jury trial, to plead not guilty, to present a defense, to confront witnesses, to require the State to prove guilt beyond a reasonable doubt, and to a fair trial were violated when trial counsel advocated his guilt of second degree murder; (8) the trial court erred in failing to appoint certified indigent counsel; (9) the trial court erred in denying the defendant's motion to suppress the statement of Gayle Houston as untimely; (10) the State exercised peremptory challenges based on the race of prospective jurors in violation of state and federal equal protection clauses and LSA–C.Cr.P. art. 795; (11) the trial court erred in failing to give a "lesser-included offense" instruction; (12) the trial court erred in permitting "untested, unnoticed, unadjudicated act evidence" at the penalty phase, in violation of *State v. Jackson*, 608 So.2d 949 (La. 1992), the Eighth Amendment, and due process; (13) the trial court erred in admitting victim impact evidence from the basketball coach of one of the victims; (14) the trial court committed prejudicial error in refusing to allow the de-

fendant to voluntarily excuse himself from being present at trial; (15) the trial court erred in dismissing the defendant's "Second Motion for New Trial," without reaching any of the merits, pursuant to an incorrect application of LSA–C.Cr.P. art. 853(B); and (16) the trial court erred in failing to hold a renewed competency hearing in violation of LSA–C.Cr.P. art. 643 and procedural due process. The defendant has urged no challenge to the sufficiency of the evidence used to convict him of three counts of first degree murder.

LAW AND ANALYSIS

Right to Counsel of Choice

In his first assignment of error, the defendant contends that the trial court erred in denying his pretrial motion to discharge Mr. English as his trial counsel and to substitute another attorney as defense counsel, as the defendant contends a conflict arose between the defendant and Mr. English concerning the manner of trial defense to be presented.

The Sixth Amendment to the U.S. Constitution provides that "[i]n all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence." An accused's right to counsel is echoed in Louisiana Constitution, Article I, Section 13, which states that "[a]t each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment." *See also* LSA–C.Cr.P. art. 511 ("The accused in every instance has the right to defend himself and to have the assistance of counsel. His counsel shall have free access to him, in private, at reasonable hours.").

The Supreme Court has recognized the efficacy of having the assistance of counsel during the adversarial procedure of a criminal trial. *Wheat v. United States*, 486 U.S. 153, 158–59, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988) ("[T]he Sixth Amendment secures the right to the assistance of counsel, by appointment if necessary, in a trial for any serious crime.") (citing *Gideon v. Wainwright*, 372 U.S. 335, 343–44, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963)). Although "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant," the Sixth Amendment also encompasses "the right to select and be represented by one's preferred attorney." *Wheat v. United States*, 486 U.S. at 159, 108 S.Ct. at 1697.

The denial of a criminal defendant's right to retained counsel of choice is a violation of the Sixth Amendment and a structural error, requiring reversal. *United States v. Gonzalez–Lopez*, 548 U.S. 140, 148–50, 126 S.Ct. 2557, 2564, 165 L.Ed.2d 409 (2006). When the right to be assisted by counsel of one's choice is wrongly denied, no harmless error analysis inquiring into counsel's effectiveness or prejudice to the defendant is required:

> Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

Gonzalez–Lopez, 548 U.S. at 148, 126 S.Ct. at 2563.

The assistance of counsel may be secured in various ways, including: the hiring of an attorney's services by the criminal defendant or by another on behalf of the defendant, the attorney's volunteering of services pro bono, or the court's appointment of private counsel or the public defender if the defendant is indigent.[18] *State v. Reeves*, 06–2419, p. 35 (La. 5/5/09), 11 So.3d 1031, 1055, *cert. denied*, 558 U.S. 1031, 130 S.Ct. 637, 175 L.Ed.2d 490 (2009). However, in order to exercise the right to choose a particular attorney, a defendant must have the means to obtain and afford the services of said counsel, whereas an indigent defendant has a right to "appointed" counsel, but does not have the right to have a particular attorney appointed. *State v. Sims*, 07–2216, p. 1 (La. 11/16/07), 968 So.2d 721, 722 ("A defendant is guaranteed the right to counsel of choice so long as the defendant can obtain and afford the services of said counsel."); *State v. Jones*, 97–2593, pp. 2–3 (La. 3/4/98), 707 So.2d 975, 976; *State v. Rideau*, 278 So.2d 100, 103 (La. 1973) ("An indigent defendant is not entitled to choose a certain lawyer.").[19]

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[18] *See* LSA–C.Cr.P. art. 512 ("When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:141 et seq. ..."); LSA–C.Cr.P. art. 515 ("Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of the proceedings in substitution of counsel assigned by the court. The court may assign other counsel in substitution of counsel previously assigned or specially assigned to assist the defendant at the arraignment.").

[19] *See also State v. Sims*, 07–2216, p. 1 (La. 11/16/07), 968 So.2d 721, 722 (per curiam) ("The right to private, non-appointed counsel of choice does not distinguish between a paid attorney and a pro bono lawyer.").

The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. *Wheat v. United States*, 486 U.S. at 159, 108 S.Ct. at 1697; *State v. Reeves*, 06–2419 at pp. 35–36, 11 So.3d at 1055–56. *See also Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624–26, 109 S.Ct. 2646, 2652–53, 105 L.Ed.2d 528 (1989). Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients, other than himself, in court. *Wheat v. United States*, 486 U.S. at 159, 108 S.Ct. at 1697. Similarly, a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant. *Id.* Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party, even when the opposing party is the government. *Id.*

The Supreme Court has stated unequivocally that a criminal defendant who has been appointed counsel has no right under the Sixth Amendment to the counsel of his choice:

> The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts. "[A] defendant may not insist on representation by an attorney he cannot afford."

Caplin & Drysdale, 491 U.S. at 624, 109 S.Ct. at 2652 (quoting *Wheat*, 486 U.S. at 159, 108 S.Ct. at 1697). This distinction was again noted by the Supreme Court in *United States v. Gonzalez–Lopez*, 548 U.S. at 151, 126 S.Ct. at 2565, wherein the Court held that "the right to

counsel of choice does not extend to defendants who require counsel to be appointed for them."

A defendant's right to choose his counsel only extends so far as to allow the accused to retain the attorney of his choice if he can manage to do so, but that right is not absolute. *State v. Harper*, 381 So.2d 468, 470–71 (La. 1980); *State v. Leggett*, 363 So.2d 434, 436 (La. 1978); *State v. Mackie*, 352 So.2d 1297, 1300 (La. 1977). *See also Caplin & Drysdale*, 491 U.S. at 626, 109 S.Ct. at 2652 ("Whatever the full extent of the Sixth Amendment's protection of one's right to retain counsel of his choosing, that protection does not go beyond 'the individual's right to spend his own money to obtain the advice and assistance of ... counsel.' "); *State v. Brown*, 03–0897, p. 11 (La. 4/12/05), 907 So.2d 1, 12, *decision clarified on rehearing*, 03–0897 (La. 6/29/05), 907 So.2d 1, 36, *cert. denied*, 547 U.S. 1022, 126 S.Ct. 1569, 164 L.Ed.2d 305 (2006) ("[A] criminal defendant's right to the counsel of his choice is not absolute.").

Furthermore, this court has consistently held that a defendant's right to counsel of his choice cannot be manipulated to obstruct the orderly procedure of the courts and cannot be used to interfere with the fair administration of justice. *State v. Bridgewater*, 00–1529 at p. 20, 823 So.2d at 896; State v. Seiss, 428 So.2d 444, 447 (La. 1983); *State v. Champion*, 412 So.2d 1048, 1050 (La. 1982). *See also State v. Givens*, 99–3518, pp. 9–10 (La. 1/17/01), 776 So.2d 443, 452. The "[d]efendant must exercise his right to counsel of his choice at a reasonable time, in a reasonable manner[,] and at an appropriate stage of the proceedings." *State v. Seiss*, 428 So.2d at 447. A trial court, therefore, does not abuse its broad discretion to conduct proceedings "in an orderly and expeditious manner," as mandated by LSA–C.Cr.P. art. 17, by denying a continuance on the morning of trial

based on the defendant's desire to change counsel. *State v. Anthony*, 347 So.2d 483, 487 (La. 1977) ("The law is well settled that a defendant in a criminal trial cannot, by a last minute change of counsel, force a postponement of his trial.").

The circumstances of *State v. Seiss*, supra, are analogous to the present case. In *State v. Seiss*, an indigent defender was appointed to represent the defendant, and on the day of trial the defense counsel presented a motion to withdraw so that the defendant could substitute another defense counsel. The indigent defender explained to the court why he should be allowed to withdraw from representation of the defendant:

> Yesterday I talked with Mr. Seiss and he emphatically informed me that he had no desire at all for me to represent him. It is my position that the fiduciary relationship of attorney/client is too valuable for me to be forced to represent a client who has no confidence in my abilities, nor is he willing to cooperate with me in any manner for me to represent him. Given that lack of rapport between us ... I don't see how the amount of exposure that he has in this matter that I should be forced to represent him and I do not think that the administration of criminal justice in Rapides Parish would be so unduly burdened by allowing him, now that his indigency status has altered, he is employed and he is financially able to hire an attorney of his own choosing why he could not be allowed to so do and that's basically my position.

State v. Seiss, 428 So.2d at 446. The defendant also informed the court of his reason for seeking to replace

appointed counsel with retained counsel: "Like he said, you know, he was appointed to me as a State lawyer and now ... I [am] employed and I'd like to get a lawyer of my choice." *Id.* Although the defendant claimed to have hired a replacement attorney, that attorney had not enrolled as counsel for the defendant and was not present on the day of trial; the trial court denied the motion to withdraw. *Id.* In ruling that the trial court did not abuse its discretion in denying defense counsel's motion to withdraw, this court stated:

> This court has consistently held that this right cannot be manipulated to obstruct the orderly procedure of the courts and cannot be used to interfere with the fair administration of justice. *State v. Champion*, 412 So.2d 1048, 1050 (La. 1982); *State v. Johnson*, 389 So.2d 1302, 1304 (La. 1980); *State v. Jones*, 376 So.2d 125, 129 (La. 1979); *State v. Lee*, 364 So.2d 1024, 1028 (La. 1978); *State v. Anthony*, 347 So.2d 483, 487 (La. 1977). Defendant must exercise his right to counsel of his choice at a reasonable time, in a reasonable manner and at an appropriate stage of the proceedings. *State v. Champion*, supra at 1050; *State v. Johnson*, supra at 1304; *State v. Lee*, supra at 1028; *State v. Leggett*, 363 So.2d 434, 436 (La. 1978); *State v. Cousin*, 307 So.2d 326, 328 (La. 1975). Absent a justifiable basis, "[t]here is no constitutional right to make a new choice of counsel on the very date the trial is to begin, with the attendant necessity of a continuance and its disrupting implications." *State v. Leggett*, supra at 436. Once the trial date has arrived, the question of withdrawal of counsel largely rests with the discretion of the trial court, and his ruling will not be disturbed

> in the absence of a clear showing of abuse of discretion. *State v. Leggett*, supra at 436; *State v. Cousin*, supra at 328; State v. Boudoin, 257 La. 583, 588–89, 243 So.2d 265, 267 (1971).

State v. Seiss, 428 So.2d at 447. Likewise, in both *State v. Lee*, 364 So.2d at 1028, and *State v. Anthony*, 347 So.2d at 487, this court found no error in the trial court's denial of a motion to withdraw, on the defendant's claim that another retained counsel would be substituted, when the attorney to be substituted neither enrolled as counsel nor appeared in court on the day the motion was heard.

During the instant prosecution, the defendant was first represented by appointed counsel, then represented himself for approximately one month (as discussed hereinafter), and thereafter counsel was retained by the defendant's family.

On May 15, 2008 at the defendant's initial appearance before the court, he was referred to the public defender's office, and on June 17, 2008, when he was arraigned, the defendant was represented by the public defender's office. However, the defendant's relationship with his appointed counsel soured when the defendant felt that no investigation was being done on his claims of innocence. In February of 2010 the defendant declared that he would represent himself, but he qualified that he would be doing so only "until my [retained] counsel enrolls next month," but assured the court that whether new counsel enrolled or not he would still be prepared for previously-set trial date of May 24, 2010.

On March 1, 2010 retained counsel Larry English enrolled as defense counsel and informed the court that while the defendant's family "approached me ... about retaining my services ... I'm basically handling this case

pro bono."[20] On January 4, 2011, on motion of Mr. English, the trial court declared the defendant indigent, so that he could apply for state funding to hire mitigation experts. Nevertheless, Mr. English proceeded as either retained or pro bono counsel.

When Mr. English enrolled as defense counsel on March 1, 2010, he assured the trial court that he had begun to assemble a "legal team ... to try this case" since he was not a certified capital counsel, but he sought a continuance of the May 24, 2010 trial date. In denying the motion for continuance, the trial court extensively detailed the delays that had already been encountered in bringing the case to trial, which had been originally set for June 1, 2009, noting the fact that the defendant had previously filed a pro se motion for speedy trial on January 13, 2010. However, an application for writs was filed with the appellate court, and subsequently the trial court agreed to continue the May

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[20] On February 3, 2011, Mr. English informed the court that "there's a lot about me not having capital experience—capital certified which I'm not. But I just want to put on the record and remind the reason why I'm sitting here ... not making any money representing Mr. McCoy because Mr. McCoy's family came to me and Mr. McCoy was representing himself." Mr. English stated to the trial court that he believed that it would be better for him to represent the defendant than for the defendant to proceed pro se, but Mr. English reiterated, "I'm not being paid." The defendant then responded on the record: "Mr. English ha[s] been paid by my mom .... We're not totally ... indigent ... on this but they may have not paid him as much as he choose [sic] to pay. But he has not just taken this case without any financial contributions, Your Honor." On the issue of Mr. English's compensation, a typewritten letter, written in July of 2011 to the trial judge by the defendant's parents, appears in the record and states that they "advanced" to Mr. English $5,000 for his representation of the defendant in this capital trial, money which they stated they borrowed against their car title.

2010 trial date to February 7, 2011, on the defendant's agreement to withdraw his motion for speedy trial and on Mr. English's assurance that he would not thereafter withdraw as defense counsel.

At a hearing held before the trial court on July 26, 2011, two days before the commencement of the defendant's capital trial, Mr. English stated to the court that he had learned over the weekend that the defendant wanted to terminate him as defense counsel. The defendant confirmed this statement, telling the trial court that Mr. English would not be continuing as his attorney. The trial court informed the defendant, "[T]hat's my determination at this point." The defendant then stated that Mr. English had been paid a fee, implying that he had the right to terminate Mr. English as his counsel. The defendant expressed frustration as to Mr. English's refusal to adopt his alibi defense and to the fact that Mr. English was "trying to make [him] cop to all three counts of murder," indicating these factors had caused a breakdown in the attorney-client relationship. The defendant also claimed to have two new defense attorneys "on standby" ready to enroll "as soon as Mr. English is taken out of my case," and the defendant assured the trial judge that these two new attorneys were "ready to proceed [to] trial," scheduled to begin two days later, and that there would "be no ... delays." However, when the trial court asked the defendant if these replacement attorneys were present in the courtroom, the defendant replied "no." The defendant was further unable to tell the trial court the names of his new defense attorneys, but argued to the court that he was credible about the fact that new counsel would enroll as he stated.[21] The trial court then denied the de-

[21] On this issue, the defendant stated:

fendant's request to discharge Mr. English and substitute counsel, stating:

> [I]n anticipation of this motion and in looking up the law in this motion, I've looked at *State of Louisiana versus Roy Bridgewater* that is cited at 823 So.2d 877 .... Mr. McCoy, there have been times that you have been represented by the Public Defender's Office. There was a time that you had attempted to represent ... yourself .... [Y]ou have been represented by Mr. English. And the case stands for the right—you do have the right to choose counsel but that counsel cannot be chosen when it is an attempt to obstruct the Court's orderly procedure or to interfere with a fair administration of justice. And it states that ... "In order for the defendant to exercise his right to counsel he must exercise his right to counsel of his choice at a reasonable time, in a reasonable manner, and at an appropriate stage of the proceedings." This matter has been set since February. This matter has been under a scheduling order at least

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I just want to bring back to the Court's remembrance when I dismissed [public defender] Ms. Pam Smart. I didn't have a standby lawyer here then, Your Honor. And when I spoke to you about Mr. English enrolling he enrolled in the same and proper fashion in which, you know, I told you he would enroll, Your Honor. I was creditable of my word. I was creditable of the things that I spoke to you about in that aspect, Your Honor. And I'm still creditable about this aspect. These attorneys have—are very familiar with this case. They have been standing by and vindicating things with the case; they are very familiar with this case, Your Honor. That's why they're not going to need any continuance hiring for this case; they're very familiar with it.

> two different times. The case was continued by the Louisiana Second Circuit Court of Appeal in February and was continued to this term, which I specifically set aside in order to be able to have this hearing. We are two days before the hearing date .... [T]hese two attorneys that you state are going to represent you are not in this courtroom at this time. They have not come before this Court and asked to enroll in this case. Even if they were to enroll there would have to be assurances that they were prepared to go to trial on Thursday. So based on the fact that this is not a timely request and this Court also takes into consideration that even if there are irreconcilable differences between counsel and the person that is accused of a crime that the [*Bridgewater*] Court said that ... "A right to counsel choice must be made in a timely manner. It must be the choice at a reasonable time, and a reasonable manner, and at an appropriate stage of the proceedings." This is not an appropriate stage of the proceedings. There is no counsel that is present today to state that they would enroll. And therefore, I deny Mr. English being relieved at this time and he will remain as counsel of record and this case will go to trial on Thursday.

Having carefully examined the trial court record in this matter, we are unable to say the trial court erred in its finding that the defendant's motion to substitute counsel was untimely and constituted an attempt "to obstruct the Court's orderly procedure or to interfere with a fair administration of justice." Although the defendant asserts that he was unaware of Mr. English's alleged refusal to pursue his claims of innocence as a

defense and therefore unable at an earlier point in the proceedings to bring the alleged irreconcilable differences to the attention of the trial court and to seek a substitution of counsel, the record reflects that differences in the defendant's expectations for his defense and Mr. English's trial strategy were evident to the court and the parties as early as a December 14, 2010 hearing before the court, wherein the defendant and Mr. English discussed their disagreements before the trial court.

During the December 14, 2010 hearing (held on motion of Mr. English to have the defendant declared indigent so that public funds could be made available to hire mitigation experts), the trial court was informed that the defendant did not want to be declared indigent and did not want to hire mitigation experts since he wanted to put on a defense based entirely on his claim of innocence. During the hearing, Mr. English made several statements to the trial court, in the presence of the defendant, that the defendant was suffering from "severe mental and emotional issues," and yet the defendant did not seek to replace Mr. English as his defense counsel at that time.

Subsequently, during a January 4, 2011 hearing (held on issues related to pro se discovery motions filed independently by the defendant), it was revealed that Mr. English did not support the defendant's pro se discovery requests seeking to develop certain evidence and witnesses related to his claims of innocence and the existence of an alibi. At the conclusion of the hearing, the defendant acquiesced in withdrawing his various pro se motions, and he made no objection to Mr. English's continued representation.

Then, at a January 24, 2011 hearing, provoked by the district attorney in light of Louisiana Supreme Court Rule XXXI ("In any capital case in which a defendant is found to be indigent, the court shall appoint no less than two attorneys to represent the defendant ....") to "get Mr. English and/or Mr. McCoy's position" on the rule since Mr. English was not certified as a capital defense qualified counsel and there was no second defense counsel enrolled on the defendant's behalf, the trial judge questioned the defendant about the issue, and the defendant informed the court that, even though Mr. English was not capital certified, he waived any Rule XXXI entitlement to representation by two attorneys because he did not want to have the public defender's office reappointed to his case. Mr. English also divulged to the court, during that hearing, the difficulties he was having representing the defendant because of his "severe mental issues," stating, "Mr. McCoy is going to attempt to take over this trial and argue in front of the jury." Mr. English further stated, "It's going to be a zoo, Judge, because I'm not going to do what he wants me to do ... I do not believe this man is rational ... I have an ethical duty to this man not to follow his bizarre behavior." In response, the defendant advised the trial court that Mr. English "won't subpoena people that will validate my innocence," expounding at length on that assertion. The defendant further revealed to the trial court his awareness of Mr. English's planned trial strategy when he stated: "Mr. English has told me there is no way he can win this case." Notwithstanding, the defendant did not seek to have Mr. English substituted with other defense counsel.

Further, as noted hereinabove, following an order by the appellate court in *State v. McCoy*, 46,394 (La. App. 2 Cir. 2/3/11) (unpublished), the trial court held a

February 3, 2011 hearing, to revisit the defendant's refusal to allow appointment of a second defense attorney from the public defender's office to satisfy this court's Rule XXXI of "no less than two attorneys" to represent an indigent defendant, the defendant chose to continue to be represented only by Mr. English, stating, "I choose not to be strong armed to take a public defender's aspect of secondary counsel when that's totally against my wishes." It was at this hearing that the trial date of July 28, 2011 was set.

Even though the defendant claims he had no knowledge that Mr. English was going to concede his guilt until July 12, 2011, argument presented by newly-enrolled appellate counsel alluded, during a January 23, 2012 post-trial hearing on a motion for new trial, that the issue had been under discussion for at least a few months before trial, in stating:

> Mr. English formed the view relatively early on that the evidence against Mr. McCoy was overwhelming and that the ... only successful outcome in the case, in Mr. English's view, was to try to persuade the jury to return a life sentence rather than the death sentence and that the best way to do that strategically was to concede Mr. McCoy's guilt of the killings, being the killer of the three victims in this case .... A couple of months before the trial, Mr. English approached Mr. McCoy to put in fairly bold terms that he believed that Mr. McCoy needed to take a plea of guilty to a life sentence if he could get one rather than to proceed to trial.

The record clearly reveals the defendant's awareness of Mr. English's trial strategy, to avoid the death penalty by conceding guilt and seeking a life sentence,

some eight months prior to July 12, 2011.[22] Thus, the trial judge did not abuse his discretion by denying the motion to discharge and replace retained counsel two days before trial. This assignment of error is without merit.

Right to Self–Representation

In his second assignment of error, the defendant contends he was denied his right to self-representation, when, after the trial court denied his motion to substitute another trial counsel for Mr. English during a July 26, 2011 hearing on the matter held two days before trial, the defendant attempted to invoke his right of self-representation.

When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel; for this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. *Faretta v. California*, 422 U.S. at 835, 95 S.Ct. at 2541. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made "with eyes open." *Id.* Thus,

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[22] In a recorded jailhouse telephone conversation between the defendant and his father, on August 4, 2011 (the day the jury returned its unanimous verdicts in the guilt phase of the defendant's capital trial), which was filed into the record in connection with the defendant's "Supplemental Motion for New Trial," the defendant told his father, "I seen straight through English, Daddy, when he first came and met me, Daddy. And that's been over a year and a half ago."

when a defendant asserts this right of self-representation, a trial judge must make two independent decisions: (1) whether defendant's waiver of his right to be represented by counsel is intelligently and voluntarily made, and (2) whether his assertion of his right to represent himself is clear and unequivocal. *State v. Hegwood*, 345 So.2d 1179, 1181–82 (La. 1977). A trial judge confronted with an accused's unequivocal request to represent himself need determine only whether the accused is competent to waive counsel and is "voluntarily exercising his informed free will." *State v. Santos*, 99–1897, p. 3 (La. 9/15/00), 770 So.2d 319, 321 (per curiam).[23]

Whether the defendant has knowingly, intelligently, and unequivocally asserted the right to self-representation must be determined based on the facts and circumstances of each case. *State v. Bridgewater*, 00–1529 at p.18, 823 So.2d at 894 ("[C]ourts should 'indulge in every reasonable presumption against waiver.'") (quoting 3 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 11.3(a) (2nd ed. 1999)).

Furthermore, the right to self-representation is not absolute. *Martinez v. Court of Appeal of California*,

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[23] We note the Supreme Court's pronouncement in *Indiana v. Edwards*, 554 U.S. 164, 177–78, 128 S.Ct. 2379, 2387–88, 171 L.Ed.2d 345 (2008): "[T]he Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky [v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."

528 U.S. 152, 161, 120 S.Ct. 684, 691, 145 L.Ed.2d 597 (2000). Most courts require the defendant to elect to represent himself in a timely manner. *Id.*, 528 U.S. 152, 161–62, 120 S.Ct. 684, 691. A defendant who waits until trial to ask the court to excuse his appointed attorney in order to search for retained counsel, after having acquiesced in representation by an attorney throughout pretrial procedures, has waited so long that a trial judge's action in denying such a delaying tactic is justified. *State v. Hegwood*, 345 So.2d at 1182; *State v. Austin*, 258 La. 273, 278–79, 246 So.2d 12, 13–14 (1971).

In the case at bar, on July 26, 2011, the defendant sought to discharge and replace Mr. English as defense counsel, but the motion was denied by the trial court. Immediately after the trial court informed the parties that Mr. English would be continuing as counsel and that the trial would commence in two days, the defendant stated:

> MR. MCCOY: Through *Ache [sic] versus Oklahoma*,[24] Your Honor, I have the right to speak, I have a right to represent myself through Ache [sic] versus Oklahoma, Your Honor, and too—
>
> THE COURT: Not at this time, Mr. McCoy, the *State versus Bridgewater* [case] states that you have unequivocally given up that right because ... you have not made that known to the Court unequivocally before this date. So I will instruct you to speak through Mr. English at this time and ... Mr. English is your attorney and he will be representing you ....

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[24] *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

Given the circumstances and prior procedural history of this case, the defendant's one-sentence statement was not perceived by the trial court as a "clear and unequivocal" assertion of his right to self-represent. Coming as it did moments after the trial court's ruling that the defendant could not discharge and replace Mr. English as his defense counsel, since the defendant's request to do so came just two days before trial, it was not urged "in a timely manner." The trial judge refused to entertain the defendant's late mention of self-representation, stating, "Not at this time."

Notably, the trial judge had previously allowed the defendant to represent himself, in February of 2010, and the defendant did so for one month before Mr. English enrolled as counsel. In contrast with the one-line assertion the defendant invoked on July 26, 2011, after which his request was denied, he made an unequivocal invocation of his right to represent himself on February 11, 2010, when he sought to substitute his self-representation for the representation of the public defender's office, stating:

> MR. MCCOY: Your Honor, I would like to present to the Court today under *Ferret [Faretta] versus Carroll—California.*[25] I've also presented to the Public Defender's Office a valid—requested document for respective counsel to assist me through the proceeding that I'm going through and not to collate themselves within my attorney aspects. But I ask them to assist me through it because I am a competent defendant, and I am literate, and

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[25] *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

> I'm up under Ferret *[Faretta] versus California*. You know, I am eligible for—to represent myself and not being able to represent myself when I'm eligible is a violation of my Sixth and Fourteenth Amendment right. I've given the Public Defender's Office a year and a half of opportunities to represent me and they did not represent me. And being competent, and being an understanding defendant, I have the right up under the United States Constitution to represent myself and not to be forced to have representation on me ....

After this February 11, 2010 assertion of his right to self-representation, the trial judge advised the defendant of his *Miranda* rights and questioned him under *Faretta* as to his capacity to represent himself in a capital murder trial. During that colloquy, the defendant told the judge that he understood he was facing a possible death penalty, that he graduated from Rice University with a degree in Business Administration,[26] that he understood he was entitled to a trial by jury during which the State would have to prove its case beyond a reasonable doubt, and that he was entitled to an attorney. At that point, the defendant volunteered that "I'm going to have [an attorney] next month ... I have paid counsel." The trial judge completed his *Faretta* questioning and after satisfying himself that

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[26] We note that in penalty phase mitigation testimony, Dr. Mark Vigen told the jury that the defendant lied about going to Rice University and about earning a degree in Theology from another institution.

the defendant was exercising a knowing and voluntary choice with "eyes open,"[27] the trial judge continued:

> THE COURT: All right, first of all you're asking to represent yourself. I believe that you have the education if that is what you want to do but I am strongly and I mean very strongly encouraging you not to represent yourself in this matter, sir ... because of the complexities of the law in this matter and the evidence regarding this matter .... And you understand that you'll be held to the same rules [or] standards as an attorney if you represent yourself?
>
> MR. MCCOY: Yes, sir, I do. And I know this is a complex situation, Your Honor, but this is my life and ... I know the steps that I'm taking. I know the, you know, the advantages and disadvantages but I choose to proceed forward because this is for my best interest.

On February 11, 2010, based on the defendant's assurances that no one was forcing him to waive counsel, that he understood the penalties he was facing, and that he would be held to the same courtroom decorum and standards as an attorney, the trial judge ruled that the defendant could proceed pro se, noting specifically that in the event that his anticipated retained counsel did not sign on as expected, the defendant would proceed to trial representing himself on the then-scheduled trial date of May 24, 2010. The trial judge also appoint-

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[27] *Faretta v. California*, 422 U.S. at 835, 95 S.Ct. at 2541 ("A defendant ... should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' ") (quoting *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942)).

ed Randall Fish of the public defender's office to assist the defendant in any matters of law at that time.

A comparison of the colloquies that took place on February 11, 2010 and July 26, 2011 demonstrates that the July 2011 one-sentence assertion was not the definitive expression of the right to waive counsel and exercise the right to self-representation that the defendant had asserted before the trial court on February 10, 2010, and the trial judge was no doubt able to compare those two events when he dismissed the July 2011 one-sentence assertion.[28] After the trial court declined the defendant's July 26, 2011 assertion ("I have a right to represent myself through Ache [sic] versus Oklahoma"), two days before trial, the defendant presented no further assertion of a right to self-representation in lieu of retained counsel, nor did he enter a contemporaneous objection. The trial court, based on the facts and circumstances surrounding the defendant's July 26, 2011

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[28] Appellate counsel urged the same issue of self-representation at the hearing on the motion for new trial held on January 23, 2012, the denial of which counsel now asserts was error. Appellate counsel argued that in requesting to represent himself two days before trial, the defendant "wasn't playing games." In denying the motion for new trial, the trial judge recalled that defendant's July 26, 2011 assertion of his right to represent himself was a "very brief request" contrasted with his earlier (February 11, 2010) assertion to self-represent which had been granted "after a long dissertation or a long discussion with Mr. McCoy." The trial judge looked to defendant's entire history of representation in this case, which showed vacillation between appointed counsel, self-representation, and retained counsel: "There was just too much that was not clear and unequivocal about that and the Court declined to allow him to represent himself." Here, the trial judge had the benefit of his own memory of defendant's repeated endorsement of Mr. English, even after the Second Circuit pointedly questioned whether his waiver of representation by two capital qualified attorneys was knowingly and intelligently made.

statement, determined that any motion of self-representation was untimely and, as stated in *Bridgewater*, the "defendant's request to represent himself was not an unequivocal one; rather, it was an obfuscated request to substitute appointed counsel because of his disagreement with current counsel's choice of trial strategy." *State v. Bridgewater*, 00–1529 at p. 19, 823 So.2d at 895. We find no abuse of discretion in any denial by the trial court of self-representation on July 26, 2011.

Right to Hearing on Motion to Withdraw

In the defendant's third assignment of error, he contends that the trial court is required to appoint substitute counsel when the defendant makes a showing that appointed counsel is incompetent or unable for some cause to furnish adequate representation and that he made a clear showing that Mr. English was unable to furnish adequate representation, such that the trial court erred in failing to hold a hearing on the issue. The defendant argues that the trial judge had notice that the defendant's right to effective assistance of counsel was being jeopardized by the strategic differences in how to defend this case, which lead to irreconcilable differences between attorney and client.

The defendant cites *State v. Draughn*, 05–1825 (La. 1/17/07), 950 So.2d 583, *cert. denied*, 552 U.S. 1012, 128 S.Ct. 537, 169 L.Ed.2d 377 (2007), in which the capital defendant specifically did not raise a claim of ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), but rather, challenged the trial court's failure to hold a hearing or otherwise address the defendant's pretrial allegations about counsel, stating, "In brief, the defendant states: 'Mr. Draughn is not here

asserting a claim of ineffective assistance of counsel, but, rather, is challenging the trial court's failure to hold a hearing or otherwise address his pre-trial allegations.' " *State v. Draughn*, 05–1825 at pp. 18–19, 950 So.2d at 599. Likewise, the instant defendant's brief to this court states that the "*[d]efendant is not now advancing a claim under* Strickland." (Emphasis original.) The defendant further states, "[T]he summary denial of the defendant's requests and complaints without adequate investigation into Mr. McCoy's entirely legitimate grievances requires reversal."

On the similar claims urged in *State v. Draughn*, this court cited LSA–C.Cr.P. art. 921 ("A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused."), and held:

> Assuming, without deciding, that the trial court's failure to hold a hearing on the defendant's pre trial motions may have been error, this fact, without more, fails to present the court with anything from which to discern prejudice to the defendant without a corresponding claim that counsel rendered ineffective assistance at trial. At the most, the trial court's failure to hold a pre trial hearing on the motions would constitute harmless error.

State v. Draughn, 05–1825 at p. 19, 950 So.2d at 599.

In this case, the defendant claims he made a "clear showing" that he and Mr. English had a "catastrophic conflict" in their attorney-client relationship, which at a bare minimum, required the trial judge to conduct an ex parte hearing, as was done in *State v. Bridgewater*, supra, and *State v. Campbell*, 06–0286 (La. 5/21/08), 983

So.2d 810.[29] Indeed, on July 26, 2011, Mr. English asked the trial court for an ex parte hearing to air the divergent defense theories between counsel and client, which the trial court declined, telling Mr. English, "[Y]ou are the attorney, sir ... [a]nd you have to make the trial decision of what you're going to proceed with ...."

In *State v. Bridgewater*, the trial court held a pretrial, ex parte hearing (following which the transcript was sealed), in which appointed defense counsel clarified that the conflict arose out of the defendant's wish to present a defense of total innocence and counsel's recommendation that the defendant admit to second degree murder and argue that the requisite specific intent, needed to prove first degree murder, was lacking. *State v. Bridgewater*, 00–1529 at pp. 20–21, 823 So.2d at 896. In *Bridgewater*, the trial court found that the defendant had voiced the same strategic conflict with his previous counsel and that he had "gone through" two other defense attorneys, suggesting a "pattern." *Id.* Given that the Bridgewater defendant's capital trial was scheduled to begin in four days, this court found no abuse of discretion in the trial court's denial of defense counsel's motion to withdraw. *Id.*

A fair reading of the instant record leaves this court with the inescapable conclusion that the trial

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[29] Importantly, as discussed in the defendant's second assignment herein, on July 26, 2011, the defendant did not make a clear and unequivocal assertion of his right to waive counsel and represent himself, as he had done previously on February 11, 2010. Consequently, the trial judge did not err by not holding an ex parte hearing to interrogate defendant under *Faretta*. In this respect, this case is distinguishable from *Bridgewater* and *Campbell*, wherein the trial court held an ex parte hearing.

judge was intimately familiar with the strategic difficulties playing out between the defendant and Mr. English, which had previously caused the defendant to discharge the public defender's office and to briefly represent himself. Thus, an ex parte hearing for the sole purpose of reviewing the case history that was already known to the trial court was unnecessarily cumulative, particularly when the issues repeatedly came to light at various pretrial hearings, including on January 4, 2011, January 24, 2011, July 12, 2011, and July 26, 2011. The defendant's stated complaints about Mr. English all centered on strategic differences, as subsequently articulated by appellate counsel at the hearing on the motion for new trial: "Mr. McCoy's objective was to be acquitted ... and to be allowed to go home. Mr. English's clear objective was in the guilt phase to have him found guilty of second degree murder ... but given a life sentence and that if it went into the penalty phase to have the jury return a life sentence rather than a death sentence." The same scenario occurred in *Bridgewater* and *Campbell*, wherein capital defendants disagreed with their appointed counsels' appreciation of the overwhelming evidence against them and disagreed with counsels' decision to embark on the same defense strategy as Mr. English did in this case, leading to requests to forego representation by their respective counsel.

In this case, neither the defendant nor appellate counsel argue that Mr. English was otherwise incompetent as a defense attorney, although there was considerable discussion about his lack of capital certification. Mr. English held himself out as "a seasoned criminal trial lawyer," who had "practic[ed] law for close to twenty years."

This court has stated that the district court cannot be required to appoint different counsel "merely to

please the desires of the indigent accused, in the absence of a showing that the court appointed attorney is inept or incompetent to represent the accused." *State v. White*, 256 La. 36, 42, 235 So.2d 84, 86 (1970).

Nothing presented by the defendant in this assignment of error suggests that the trial judge in this case abused his discretion by not holding an ex parte hearing, in addition to the July 26, 2011 hearing, on the question of Mr. English's competence to provide an adequate representation. Notwithstanding, any trial court error in this respect appears harmless under *State v. Draughn*, supra, and *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993) ("The inquiry ... is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error."). For these reasons, this assignment of error is without merit.

Concession of Guilt at Trial

In his fourth assignment of error, the defendant contends that the trial court erred in ruling that the defendant's retained counsel could decide whether to concede guilt of the charged murders at trial, without the defendant's consent. The defendant asserts that the relationship between an attorney and his client "is one of principal and agent wherein the lawyer's authority derives from and is limited by the authority of the client" (emphasis omitted), such that the defendant should have been able to decide what manner of defense would be presented at trial, instead of having to accept Mr. English's decision to concede his guilt, at the outset, in the opening statement.

In support of his position on this issue, the defendant cites *State v. Felde*, 422 So.2d 370, 393 (La. 1982), *cert. denied*, 461 U.S. 918, 103 S.Ct. 1903, 77 L.Ed.2d 290 (1983), in which the capital defendant asserted that he was "denied effective assistance of counsel at trial due to adherence by defense counsel to an employment condition set by the defendant that defense counsel not attempt to obtain any jury verdicts other than 'Not Guilty by Reason of Insanity' or 'Guilty of First Degree Murder' with Capital Punishment." After the *Felde* defendant was sentenced to death, he appealed raising a claim of ineffective assistance for counsel's adherence to pursue the "all or nothing" strategy he had imposed. This court refused to find the *Felde* defendant's counsel ineffective, observing that "[u]nder our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney .... The fact that a particular strategy is unsuccessful does not establish ineffective assistance." *State v. Felde*, 422 So.2d at 393. The *Felde* court went on to rule that "a defendant can limit his defense consistent with his wishes *at the penalty phase of trial.*" *Id.*, 422 So.2d at 395 emphasis added).

This court has subsequently applied the *Felde* case to permit a capital defendant to instruct his appointed counsel not to present any mitigating evidence *in the penalty phase*. *State v. Bordelon*, 07–0525, pp. 35–36 (La. 10/16/09), 33 So.3d 842, 864–65. *Cf. Schriro v. Landrigan*, 550 U.S. 465, 479–81, 127 S.Ct. 1933, 1942–44, 167 L.Ed.2d 836 (2007) ("[I]t was not objectively unreasonable for th[e] [Arizona] court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate

further possible mitigating evidence ...."). Importantly, *State v. Felde* did not endorse the suggestion espoused in the instant case by the defendant, i.e., that trial counsel must adopt a capital client's unsupportable trial strategy *at the guilt phase*, particularly when the assertion of such a defense would involve perjured testimony.

Nevertheless, the defendant urged in brief to this court that Mr. English should have advanced his "unflinchingly maintained claim of innocence," while Mr. English repeatedly advised the trial court that to do so would run afoul of his ethical obligations. *See* Louisiana Rules of Professional Conduct, Rule 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent ...."). Given the overarching burden of Mr. English's requirement as an attorney to adhere to Rule 1.2(d), the defendant's repeated assertion that "the principal has the right throughout the duration of the relationship to control the agent's acts" is unpersuasive.

The Supreme Court discussed such an ethical dilemma in *United States v. Cronic*, 466 U.S. 648, 656 n.19, 104 S.Ct. 2039, 2045 n.19, 80 L.Ed.2d 657 (1984):

> Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt. And, of course, even when there is a bona fide defense, counsel may

> still advise his client to plead guilty if that advice falls within the range of reasonable competence under the circumstances. [Citations omitted.]

Applying these ethical considerations to the present case, the agency relationship between an attorney and client anticipates that the attorney will comply with the client's *lawful* instructions. In this case, presenting an alibi defense at the guilt phase put Mr. English in an ethical conundrum, as committing perjury is a crime pursuant to LSA–R.S. 14:123. In *Nix v. Whiteside*, 475 U.S. 157, 173–76, 106 S.Ct. 988, 997–99, 89 L.Ed.2d 123 (1986), the Supreme Court determined that the Sixth Amendment right to assistance of counsel is not violated when an attorney refuses to cooperate with a defendant in presenting perjured testimony at trial.

In the instant case, the State's evidence against the defendant was overwhelming. In a post-trial affidavit, Mr. English explained his trial strategy:

> Robert McCoy believed that law enforcement and others were conspiring against him and he was simply unable to accept the evidence against him .... I became convinced that the evidence against Robert McCoy was overwhelming .... I know that Robert was completely opposed to me telling the jury that he was guilty of killing the three victims and telling the jury that he was crazy but I believed that this was the only way to save his life. I needed to maintain my credibility with the jury in the penalty phase and could not do that if I argued in the guilt phase that he was not in Louisiana at the time of the killings, as he insisted. I consulted

with other counsel and was aware of the *Haynes* case and so I believed that I was entitled to concede Robert's guilt of second degree murder even though he had expressly told me not to do so. I felt that as long as I was his attorney of record it was my ethical duty to do what I thought was best to save his life even though what he wanted me to do was to get him acquitted in the guilt phase. I believed the evidence to be overwhelming and that it was my job to act in what I believed to be my client's best interests .... I firmly believe that Robert McCoy is insane and was not competent to be tried .... [H]e could not assist counsel or participate effectively in the proceedings due to his mental illness. He could not rationally understand the proceedings because he saw the evidence, the procedures and the rulings through the lens of his delusion that law enforcement, the prosecutor, the judge and ultimately myself were conspiring against him. Robert could not consult with me with any reasonable degree of rational understanding both because his paranoia and delusions destroyed our professional relationship and also because all information was distorted or obscured by his delusions.... Robert was unable to deal rationally with the evidence of his guilt and the case against him. Robert could not recall and relate facts pertaining to his actions and whereabouts at the time of the crime because he truly believed that he was elsewhere at the time of the crime. He could not assist in locating and examining relevant witnesses because his witnesses were a part of his delusions in some cases or their relevance was dictated by his para-

> noia and his belief in a large scale conspiracy against him. Robert could not review discovery or listen to evidence and assist in assessing any distortions or misstatements because he could not grapple with the evidence in the real world. He could not make rational decisions despite my efforts to clearly explain his alternatives and could not testify except to give vent to his delusions and paranoia ....

Mr. English acknowledged his ethical dilemma to the trial judge numerous times during the course of the trial court proceedings. During a January 4, 2011 hearing, Mr. English stated that the defendant was "recommending ... a course of action that [he (Mr. English) did] not believe [was] in [the defendant's] best interest," and Mr. English "believe[d] as a lawyer that [he had] an ethical duty given the ramifications of this case to not follow that advice." Mr. England further advised the trial court, during a January 24, 2011 hearing, that he believed he "ha[d] an ethical duty to this man not to follow his bizarre behavior." Mr. England repeatedly reiterated to the trial court, as he did during a July 12, 2011 hearing, that he "ha[d] an ethical duty ... to try to defend [the defendant] and do the ... best [he (Mr. English) could] to save [the defendant's] life." The alibi defense the defendant wanted Mr. England to put on, but which could not be substantiated, had no reasonable chance of success, but exposed those who attempted such a defense to the charge of perjury.

The ongoing discussion of this trial strategy issue culminated at the pretrial hearing held on July 26, 2011, when it was raised by trial counsel as follows:

> MR. ENGLISH: Your Honor, at this time I'm going to ask for an ex parte hearing with the

> Court to discuss my representation with Mr. McCoy .... Mr. McCoy is insistent that I put forward a defense in this case at the guilt phase of this trial. I have made a determination, Your Honor, that the evidence in this case is so overwhelming against Mr. McCoy that in order to do that ....
>
> * * *
>
> THE COURT: ... I think that you've stated this on the record prior to this date .... I believe that—you are the attorney, sir .... And you have to make the trial decision of what you're going to proceed with ....

Clearly, the trial judge had Professional Conduct Rule 1.2(d) in mind when he reminded Mr. English that he was the attorney, i.e., the person who had the ethical obligation to advance a lawful defense.[30]

Conceding guilt, in the hope of saving a defendant's life at the penalty phase, is a reasonable course of action in a case in which evidence of guilt is overwhelming. Louisiana courts have consistently upheld the defense strategy of acknowledging guilt, against a charge of ineffective assistance of counsel, under the standard enunciated in *Strickland*. *See, e.g., State v. Tucker*, 13–1631, pp.

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[30] *See also* Louisiana Rules of Professional Conduct, Rule 3.3(b) ("A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."). In furtherance of his ethical obligations, before the defendant testified in the guilt phase of the trial, Mr. English stated on the record that he had advised the defendant not to testify and had warned him about perjury and its criminal consequences.

36–41 (La. 9/1/15), 181 So.3d 590, 618–21, *cert. denied*, —— U.S. ——, 136 S.Ct. 1801, 195 L.Ed.2d 774 (2016) (wherein the capital defendant did not acquiesce in counsel's decision to admit guilt of second degree murder and feticide in the guilt phase closing argument and, on direct appeal, this court found that the defendant failed to demonstrate a per se violation of the Sixth Amendment resulting from a conflict of interest, noting that "counsel's obligation to provide effective assistance 'is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth' and did not extend to 'in any way assisting the client in presenting false evidence or otherwise violating the law' "; no claim of ineffective assistance, under Strickland, was presented on appeal); *State v. Holmes*, 06–2988, p. 1 n.2 (La. 12/2/08), 5 So.3d 42, 48, cert denied, 558 U.S. 932, 130 S.Ct. 70, 175 L.Ed.2d 233 (2009) (unpublished appendix) (noting defense counsel conceded the defendant was guilty of second degree murder, but that the jury found the State proved guilt of first degree murder, this court concluded that, given the defendant's numerous inculpatory statements and possession of the victim's property, counsel's decision to concede her guilt to second degree murder fell well within the ambit of sound trial strategy); *State v. Legrand*, 02–1462, p. 27 (La. 12/3/03), 864 So.2d 89, 107 (unpublished appendix) ("[R]egarding counsel's acknowledgment of guilt during defense closing argument, an acknowledgment of guilt may form part of defense strategy" and did not constitute ineffective assistance.); *State v. Taylor*, 01–1638, p. 4 (La. 1/14/03), 838 So.2d 729, 737 ("The defense conceded defendant's guilt, but argued the crime more properly fit second degree murder."); *State v. Frost*, 97–1771 (La. 12/1/98), 727 So.2d 417, 439, cert denied, 528 U.S. 831, 120 S.Ct. 87, 145 L.Ed.2d 74 (1999) (unpublished appendix) ("Trial counsel employed a clear strategy throughout voir dire, the guilt phase,

and the penalty phase of defendant's trial of acknowledging defendant's guilt and the brutal nature of the crime while pleading for the jury to spare defendant's life ... [C]ounsel's admission that the crime was 'cruel, heinous, and atrocious,' formed part of a carefully constructed strategy to save defendant's life ... [T]he defendant has not demonstrated counsel's decision rendered his trial globally unfair or the verdict generally suspect ... [and it] did little to prejudice defendant's case."); *State v. Burkhalter*, 428 So.2d 449, 457 (La. 1983) (wherein the defendant was found guilty of second degree murder, though charged with first degree murder, and this court found no ineffective assistance of defense counsel, who had argued that at most the defendant was guilty of second degree murder; this court stated, "Defendant's lawyer succeeded in saving defendant from execution, no doubt ... because of tactical decisions in trying the case like the arguments to which defendant now takes exception."); *State v. Berry*, 430 So.2d 1005, 1014–15 (La. 1983) (wherein defense attorney's admission of the defendant's intent to commit robbery was not held ineffective assistance of counsel, finding that counsel "may have been trying to establish his candor with the jury" and that "[n]arrowing the presumption of innocence claim to the charge of first degree murder was intended to direct the jury toward a lesser verdict").

This court does not sit to second guess strategic and tactical choices made by trial counsel. *State v. Hoffman*, 98–3118, p. 40 (La. 4/11/00), 768 So.2d 542, 579, *supplemented*, 00–1609 (La. 6/14/00), 768 So.2d 592 (per curiam), *cert. denied*, 531 U.S. 946, 121 S.Ct. 345, 148 L.Ed.2d 277 (2000); *State v. Myles*, 389 So.2d 12, 31 (La. 1979). We find no merit in this assignment of error.

Counsel's Failure to Follow Express Directions of the Defendant

In the interrelated fifth and sixth assignments of error, the defendant claims that he was denied the assistance of counsel within the meaning of the Sixth Amendment to the United States Constitution and Article I, § 13 of the Louisiana Constitution when his lawyer conceded his guilt against his expressly-stated wishes, setting up an irreconcilable conflict of interest between attorney and client and resulting in defense counsel's failure to adversarially test the State's case.[31]

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[31] In the guilt phase opening statement by Mr. English, he stated to the jury, in pertinent part:

> [A]s a defense lawyer, we are trained to make the State prove every piece of evidence that it wishes to interject into a trial. In this case I cannot stand in front of you because of what the stakes are in this case and lie to you or tell you any differently that the District Attorney can prove every fact that he has just alleged to you. There is no way reasonably possible that you can listen to the evidence in this case and not come to any other conclusion than Robert McCoy was the cause of these individuals' death[s]. But that's not the only issue to be decided. First degree murder requires that there be specific intent—specific intent to kill those individuals. The State cannot put on any evidence that Robert McCoy ever made any malice statement towards those individuals; that those individuals was [sic] ever on his radar to do harm. Robert McCoy is crazy .... He meets the legal definition of competent, but evidence will be put on in this case that Robert McCoy suffers from emotional and mental issues that affects [sic] his ability to make decisions in this case .... We believe that the evidence will show that because of Mr. McCoy's emotional and mental conditions that this is a second degree murder trial.

By conceding the defendant's guilt in his opening statement and again in his closing argument of the guilt phase—conceding before the jury that the defendant caused the deaths of the three victims but because of his mental deficiencies he lacked the specific intent to murder—the defendant argues that Mr. English failed to subject the prosecution's case to meaningful adversarial testing, and under *United States v. Cronic*, supra, prejudice must be presumed. The defendant urges that this trial strategy deprived him of the presumption of innocence along with the right to knowingly and intelligently exercise his privilege against compulsory self-incrimination, his right to trial by jury, his right to present a defense, and his right to confront his accusers. Even though the fifth and sixth assignments of error are worded in terms of "denial of right to counsel," the argument is essentially one of ineffective assistance of counsel, which this court has consistently reviewed under the *Strickland* standard.[32]

In *United States v. Cronic*, decided the same day as *Strickland v. Washington*, the Supreme Court created a limited exception to the application of Strickland's two-part test in situations that "are so likely to prejudice the accused that the cost of litigating their effect in

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[32] Under the standard for ineffective assistance of counsel set out in *Strickland v. Washington*, adopted by this court in *State v. Washington*, 491 So.2d 1337, 1339 (La. 1986), a reviewing court must reverse a conviction if the defendant establishes: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that counsel's inadequate performance prejudiced defendant to the extent that the trial was rendered unfair and the verdict suspect. Nevertheless, the defendant in the instant case specifically avers that he is not raising a claim of ineffective assistance of counsel under Strickland in this direct appeal, reserving that claim for collateral review.

the particular case is unjustified." *Cronic*, 466 U.S. at 658, 104 S.Ct. at 2046. The Supreme Court identified three situations implicating the right to counsel in which prejudice will be presumed. First are situations in which a defendant is denied counsel at a critical stage of a criminal proceeding, i.e., the complete denial of counsel. Second, and the most relevant here, are situations in which a defendant's trial counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659, 104 S.Ct. at 2047. Finally, prejudice is presumed when the circumstances surrounding a trial prevent a defendant's attorney from rendering effective assistance of counsel. *Cronic*, 466 U.S. at 659–60, 104 S.Ct. at 2047 (citing *Powell v. Alabama*, 287 U.S. 45, 57–58, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). As to the second situation envisioned by *Cronic*, prejudice is presumed when the attorney " 'entirely fails to subject the prosecution's case to meaningful adversarial testing.' " *Bell v. Cone*, 535 U.S. 685, 696–97, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914 (2002) (quoting *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039). *Bell v. Cone* made plain that the difference between *Strickland*, which deals with the failure of counsel on specific points, and *Cronic*, which addresses the complete failure of counsel to oppose the prosecution, is one "not of degree but of kind." *Id.*[33] Courts distinguish *Strick-*

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[33] In *Bell v. Cone*, the Supreme Court held that the defendant's claims that counsel had been ineffective at his capital sentencing hearing for failing to adduce mitigating evidence and for waiving closing argument. The Court found that such omissions "are plainly of the same ilk as other specific attorney errors we have held subject to Strickland's performance and prejudice components." *Bell v. Cone*, 535 U.S. at 697–98, 122 S.Ct. at 1851–52. Notably, in *Cronic*, the Supreme Court remanded that case to be considered under the *Strickland* test. *Cronic*, 466 U.S. at 666–67, 104 S.Ct. at 2050–51.

land and *Cronic*, as the "distinction between ineffective assistance of counsel and the constructive denial of counsel," respectively. *Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002), cert. denied, 537 U.S. 1072, 123 S.Ct. 676, 154 L.Ed.2d 567 (2002).

In the present case, the defendant argues that *Cronic* controls his Sixth Amendment claim and that prejudice should be presumed because, by conceding his guilt in the opening statement of the guilt phase of trial, Mr. English "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." (Emphasis omitted.) On the other hand, the State opines that in analyzing the defendant's counsel and representation claims, the Strickland standard should apply. For the second situation of *Cronic* to apply, "the attorney's failure must be complete." *Bell v. Cone*, 535 U.S. at 697, 122 S.Ct. at 1851. Here, by conceding the defendant's guilt, Mr. English did not completely abdicate the defendant's defense, rather Mr. English advanced what he saw was the only viable course of action. At the hearing on the motion for new trial, Mr. English testified about his trial strategy of conceding the defendant's guilt:

> [MR. ENGLISH:] I reached that conclusion [as to trial strategy] a long time before [the day of trial], that I was going to have to stand in front of that jury and beg for Robert McCoy's life. I had no option.
>
> [POST–CONVICTION DEFENSE COUNSEL:] And that conceding his guilt in your mind was the only way to go for it.
>
> [MR. ENGLISH:] I'm a seasoned criminal trial lawyer, had been doing this for a number of

> years, and I had never had a case where the evidence was so overwhelming against a client.

In addition, Mr. English remained active at trial, probing weaknesses in the prosecution's case. As stated hereinafter in connection with our discussion of the defendant's tenth assignment of error, during jury selection, Mr. English ardently fought to retain some racial diversity in the defendant's trial by pressing a *Batson* claim and arguing for challenges when warranted. During trial, Mr. English cross-examined most of the State's guilt phase witnesses, frequently asking questions written by the defendant.[34]

Here, the defendant pled not guilty to the three-count indictment. Mr. English's strategy was to concede the defendant's guilt, but in an effort to spare him

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[34] Mr. English was able to get the police officer who had pursued the suspect, who fled from the scene of the crime in a white car owned by the defendant, to admit that he could not positively identify the assailant he was pursuing as the defendant. Mr. English cross-examined the police dispatcher, who admitted that there was no way to identify the "Robert" named in the 911 recording as the defendant, without a last name having been given. Mr. English also elicited testimony from the State's firearms examiner that she had not been asked to look for DNA or fingerprints on the weapon or the cartridges or bullets, and she did not know who had fired the weapon. On cross-examination by Mr. English, the Walmart employee/witness admitted that he could not say that the individual in the video purchasing ammunition was definitely the defendant. Mr. English elicited testimony from the forensic pathologist that there was a sufficient quantity of a marijuana metabolite in the body of victim Willie Young at the time of autopsy to indicate that Mr. Young had smoked some marijuana thirty to sixty minutes prior to his death. During Mr. English's cross-examination of the defendant's friend, Gayle Houston, Mr. Houston admitted that when he gave the defendant a ride on the evening of the shooting, the defendant was crying, thereby humanizing the defendant as capable of remorse in front of the jury.

capital punishment he argued that a verdict of second degree murder would be more appropriate, asserting that the defendant's mental incapacity prevented him from forming the requisite specific intent to commit first degree murder. The defendant faults this trial strategy, given that Louisiana does not recognize the defense of diminished capacity.[35] The defendant urges

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[35] In *State v. Dressner*, 08–1366, pp. 25–26 (La. 7/6/10), 45 So.3d 127, 143–44, *cert. denied*, 562 U.S. 1271, 131 S.Ct. 1605, 179 L.Ed.2d 500 (2011), this court stated:

> It is well-settled, "[w]hen a defendant is tried upon a plea of 'not guilty', evidence of insanity or mental defect at the time of the offense shall not be admissible." La.Code Crim. Proc. art. 651; *State v. Holmes*, 06–2988, p. 46 (La. 12/2/08), 5 So.3d 42, 74, *cert. denied*, 558 U.S. 932, 130 S.Ct. 70, 175 L.Ed.2d 233 (2009). Under La.Rev.Stat. § 14:14, Louisiana's codification of the *M'Naughten* Rule, an offender is exempt from criminal responsibility only if he is incapable of distinguishing between right and wrong with reference to the conduct in question. Thus, Louisiana does not recognize the doctrine of diminished capacity absent a dual plea of not guilty and not guilty by reason of insanity. *State v. Deboue*, 552 So.2d 355, 366 (La. 1989), *cert. denied*, 498 U.S. 881, 111 S.Ct. 215, 112 L.Ed.2d 174 (1990); *State v. Nelson*, 459 So.2d 510, 513 (La. 1984), *cert. denied*, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 322 (1985); *State v. Lecompte*, 371 So.2d 239, 243 (La. 1978). Evidence of a mental defect, which does not meet the *M'Naughten* definition of insanity, therefore, cannot negate a specific intent to commit a crime and reduce the degree of the offense. *Holmes*, 06–2988 at p. 46, 5 So.3d at 74. Consequently, in crimes requiring specific intent, diminished mental capacity is not a recognized defense. *Lecompte*, 371 So.2d at 243. [Footnote omitted.]

In the present case, the defendant did not enter a dual plea of not guilty and not guilty by reason of insanity, and thus no evidence of insanity or mental defect at the time of the offense was admissible at his trial. *See* LSA–C.Cr.P. art. 651 ("When a de-

that, by conceding the only factual issue in dispute, Mr. English did not submit the State's case to the crucible of adversarial testing and, thus, denying him the second category of right to counsel delineated in *Cronic*, and depriving him of a fundamentally fair trial, requiring reversal without any showing of specific prejudice.

The U.S. Supreme Court addressed a similar argument in *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004). Nixon was charged with capital murder and faced overwhelming evidence of his guilt at trial, including his own confession in graphic detail as to how he kidnapped and killed his victim. *Nixon*, 543 U.S. at 180, 125 S.Ct. at 556. After investigating the State's evidence and witnesses, defense counsel developed a strategy to concede Nixon's guilt and ask the jury to spare his life. *Id.*, 543 U.S. at 181, 125 S.Ct. at 557. Defense counsel explained this strategy to Nixon on multiple occasions. *Id.* However, Nixon never consented and, instead, remained unresponsive throughout these discussions. *Id.* After state post-conviction proceedings, the Florida Supreme Court, relying on *Cronic*, held that Nixon's conviction should be reversed because of defense counsel's failure to obtain Nixon's affirmative and explicit consent to pursue a strategy of conceding guilt. *Id.*, 543 U.S. at 186, 125 S.Ct. at 560. The U.S. Supreme Court granted certiorari to resolve the question of whether defense counsel's failure to obtain Nixon's express consent to concede his guilt should be evaluated under *Cronic* or *Strickland*. *Nixon*, 543 U.S. at 186–87, 125 S.Ct. at 560. The Supreme Court reversed, holding that "counsel's

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fendant is tried upon a plea of 'not guilty', evidence of insanity or mental defect at the time of the offense shall not be admissible ....").

effectiveness should not be evaluated under the *Cronic* standard, but under the standard described in *Strickland*." *Id.*[36] Defense counsel, in conceding Nixon's factual guilt, had not waived the State's obligation to prove beyond a reasonable doubt, through competent and admissible evidence, that Nixon committed first degree murder. *Id.*, 543 U.S. at 188, 125 S.Ct. at 561. The Supreme Court stated that such a concession strategy does not amount to the functional equivalent of entering a guilty plea on the defendant's behalf—the State must still prove its case subject to cross-examination of its witnesses by defense counsel—and may constitute a reasonable strategic choice in a case in which the circumstances of the crime are horrendous and the evidence of the defendant's guilt overwhelming.[37] Under those circumstances, " 'avoiding execution [may be] the best and only realistic result possible.' " *Id.*, 543 U.S. at 191, 125 S.Ct. at 562–63 (quoting ABA

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[36] *See also Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002) (commenting that "those courts that have confronted situations in which defense counsel concedes the defendant's guilt for only lesser-included offenses have consistently found these partial concessions to be tactical decisions, and not a denial of the right to counsel. As such, they have analyzed them under the two-part *Strickland* test.") (footnote omitted).

[37] Herein, the defendant cites *Cooke v. State*, 977 A.2d 803, 843–44 (Del. 2009), also a capital case, in which the Delaware Supreme Court reversed the defendant's conviction because defense counsel not only argued for a verdict of "guilty but mentally ill" over his client's objection (albeit without formally changing his plea), but defense counsel also introduced a privileged and otherwise inadmissible confession to the crime in order to advance the mental illness argument. The confession, which the *Cooke* defendant disputed, essentially made the State's case at the guilt stage. Here, although the defendant claims that *Cooke* is "on all fours" with the present case, the distinction is obvious, and this court is not bound by it.

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, § 10.9.1, Commentary (Rev. ed. 2003) (reprinted in 31 Hofstra L.Rev. 913, 1040 (2003)).[38]

Given the circumstances of this crime and the overwhelming evidence incriminating the defendant, admitting guilt in an attempt to avoid the imposition of the death penalty appears to constitute reasonable trial strategy. The jury was left with several choices after Mr. English conceded that the defendant shot the three victims, including returning a responsive verdict of second degree murder or manslaughter, as well as not returning the death penalty. Therefore, in light of *Nixon*, the defendant has not shown that trial counsel's actions were ineffective. *See State v. Felde*, 422 So.2d at 393 ("The fact that a particular strategy is unsuccessful does not establish ineffective assistance."). *Cf. Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995) ("A defendant may prevail on an ineffective assistance claim relating to trial strategy ... if he can show counsel's strategy decisions would not be considered sound.").

The defendant states that he "is explicitly not raising a claim of ineffective assistance under the *Strickland* standard at this time," in which case the defend-

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[38] *Nixon* acknowledged that although such a concession in a run-of-the-mill trial might present a closer question, "the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus .... Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared." *Nixon*, 543 U.S. at 190–92, 125 S.Ct. at 562–63. The Court reasoned, "In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in a useless charade." *Id.* (internal quotation marks and citation omitted).

ant "would bear the burden of establishing prejudice," reserving that claim for post-conviction proceedings "if they should become necessary."

Accordingly, we conclude that the defendant has shown no per se violation of the Sixth Amendment resulting from any conflict of interest. Therefore, we find no merit in the defendant's fifth and sixth assignments of error.

Deprivation of Other Constitutional Rights

In his seventh assignment of error, the defendant complains that Mr. English was not acting as the defendant's lawyer "in any true sense," which deprived him of his constitutional rights, including the right to compulsory process. Specifically, the defendant claims that Mr. English refused to subpoena the defendant's witnesses, offered no opposition to quashal of the defendant's pro se subpoenas, and declared that he would not call any of the witnesses the defendant sought by way of those subpoenas, contrary to the defendant's wishes. The defendant also complains that by conceding his guilt Mr. English nullified his plea of not guilty, deprived him of his constitutional right to an impartial jury, and Mr. English's "limited" cross-examination undermined his right to confront and cross-examine his accusers, all of which relieved the State of its burden under the Due Process Clause. The defendant suggests that at his capital trial, he "had in effect two prosecutors and no defense lawyer."

The defendant's pro se subpoena requests commanded a good bit of the trial court's pretrial attention in this case. As noted in our discussion of the defendant's fourth assignment of error, supra, presentation of the defendant's alibi defense was not ethically possible

for Mr. English, and thus there was no legitimate reason that Mr. English would have defended the pro se subpoena requests from quashal. *See State v. Kenner*, 336 So.2d 824, 831 (La. 1976) (counsel is not required to undertake futile steps). No constitutional violation has been demonstrated.

Likewise, as discussed in connection with the defendant's fifth assignment of error, supra, Mr. English actively cross-examined the State's witnesses. Finally, Mr. English's concession of guilt did not render the defendant's not guilty plea meaningless, as the State was still obliged to present evidence establishing the essential elements of the crimes charged. *See Florida v. Nixon*, 543 U.S. at 187–88, 125 S.Ct. at 560–61 (counsel's guilt phase concession of Nixon's guilt did not amount to "the functional equivalent of a guilty plea" and did not waive Nixon's constitutional rights, including the right to a trial by jury, the protection against self-incrimination, and the right to confront one's accusers).

The abundance of evidence that the defendant killed the three victims in this case set the course for how the trial would unfold. All of the parties were imminently aware of the high stakes of the capital trial.[39] At every turn, the trial judge scrupulously sought to protect the defendant's constitutional rights. Mr. English's strategic decision to concede factual guilt did not waive the defendant's constitutional rights, but rather was a strategic choice designed to obtain the lesser

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[39] *See California v. Ramos*, 463 U.S. 992, 998–99, 103 S.Ct. 3446, 3452, 77 L.Ed.2d 1171 (1983) (recognizing that "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

verdict of second degree murder, instead of first degree murder. Nixon forecloses the claims raised in this assignment of error.

Failure to Appoint Certified Capitol Defense Co-Counsel

In the defendant's eighth assignment of error, he claims that he was denied the assistance of co-counsel to which he was entitled and that his waivers of appointment of co-counsel were not knowingly and intelligently made. The issue arose during pretrial at hearings held on January 24, 2011 and February 3, 2011. At the conclusion of both hearings, the trial judge indicated that the "only way" he could appoint additional counsel would be to have the public defender's office assist Mr. English as co-counsel, a choice that the defendant repeatedly declined as an option. Consequently, the hearings ended with the trial judge's conclusion that the defendant had made a "knowing, voluntary, and intelligent" waiver of co-counsel, and he denied the State's motion for appointment of additional counsel. The defendant now argues that at both the January 24, 2011 and the February 3, 2011 hearings, the trial court erred by failing to fully advise him of the benefits of two capital qualified attorneys. The defendant further suggests that the trial judge erred by limiting his options for co-counsel to only that provided by the public defender's office, when additional counsel could have been appointed from the "office of the State Public Defender."

At issue during the January 24, 2011 hearing was Louisiana Supreme Court Rule XXXI(A)(1)(a), which provides that in cases of indigent capital defendants, the trial court "shall appoint no less than two attorneys to represent the defendant. At least two of the ap-

pointed attorneys must be certified as qualified to serve in capital cases ...." "[T]o determine defendant's waiver of co-counsel at defendant's capital murder trial," the State had filed a "Motion to Determine Waiver of Co-Counsel," which was before the court on January 24, 2011. Also present at the January 24, 2011 hearing was Randall Fish of the local public defender's office.

During the hearing, not only did the trial court inform the defendant of his rights, but the district attorney also stated that "the intent of the rule in having two attorneys is, if one attorney gets up there in the guilt phase and the jury finds the defendant guilty there is a theory out there that that attorney has lost his ... 'creditability' ... with the jury. And then another attorney should step up to handle ... the penalty phase." Mr. English advised the court that he did "not have another counsel that intends to participate at trial." After the defendant and trial counsel conferred, the following colloquy occurred:

> MR. ENGLISH: It is my understanding that if the Court appoints a co-counsel, that co-counsel ... would be a public defender. Mr. McCoy has ... stated to me that he does not want the public defender's office appointed as co-counsel in this case. Okay. I want to state for the record, Your Honor ... I'm not capital certified; we waived that .... I am confident, Your Honor, that if I'm allowed to have all the tools that I can adequately give him a defense.
>
> * * *
>
> THE COURT: ... The only option that I would have, if I appointed anyone, would be the public defender's office.

MR. MCCOY: I can't get a conflict of interest attorney, Your Honor? Outside the public defender's office? From what I understood, Your Honor, I am entitled to a conflict of interest attorney, Your Honor.

[DISTRICT ATTORNEY]: Your Honor, there's never been any conflict of interest.

THE COURT: Not that I know of .... Mr. McCoy, there has not been a conflict of interest. The public defender's office would have been appointed in your case and has been appointed in your case. You retained private counsel through Mr. English .... And then you stated that you wished to waive his capital certification on the record. The other side of that is that if this Court were to appoint anyone the Court would have to appoint the public defender's office. That's the only persons that the Court could appoint .... So the Court would only have the option to appoint the public defender's office. If the public defender's office felt that there was a conflict in any way then they would appoint conflict counsel at that point. But I would have to go back to the public defender's office to appoint someone as a co-counsel, Mr. McCoy ... Do you wish this Court to appoint a public defender office attorney as a second attorney? That is up to you, Mr. McCoy.

* * *

MR. ENGLISH: I ... would not object to a co-counsel being appointed but that's up to Mr. McCoy.

> MR. MCCOY: Your Honor, I'm undecided at this moment ... that's a hard decision to make, Your Honor. This decision that I make, Your Honor ... will be a decision that will mitigate the rest of my life, Your Honor.
>
> * * *
>
> MR. ENGLISH: I think ... to make sure that we move forward with this that the Court appoint a public defender as a second counsel in this case, Your Honor.
>
> THE COURT: Mr. Fish?
>
> MR FISH: Your Honor, on behalf of the public defender's office we're going to certainly object ... to being appointed as co-counsel .... Mr. McCoy has private counsel, Your Honor.
>
> * * *
>
> MR. ENGLISH: ... [B]ecause the public defender's office objects, Your Honor, I withdraw that ... request.
>
> * * *
>
> THE COURT: Okay, then that request has been withdrawn.

Thereafter, trial counsel again conferred with the defendant and the following statements were made:

> MR ENGLISH: ... Your Honor, Mr. McCoy wants me to put on the record I have other lawyers who are advising me on this case, including the public [defender's] office .... I will be the only lawyer that will be handling the trial, Your Honor, but in terms of ... helping prepare me for this case, I have ... relied on both

> Pam Smart [and] James Gray ... [of] ... the state public defender's office, and ... several mitigation experts, Your Honor ... Mr. McCoy is now ... going to state, Your Honor, that he waives appointing a second person to the case. Correct, Mr. McCoy?
>
> MR. MCCOY: You're correct.

The January 24, 2011 hearing concluded with the defendant waiving appointment of a Rule XXXI second attorney to his case.

The counsel issue was back before the court on February 3, 2011, following remand from the Second Circuit, which included a strong directive to the trial court "to ensure that Mr. McCoy is, or has been, fully apprised on the record of the benefits of having two capital-defense qualified attorneys and that McCoy has knowingly and intelligently waived same." *State v. McCoy*, 46,394 (La. App. 2 Cir. 2/3/11). In response to the Second Circuit's February 3rd ruling, the State filed, on the same day, its motion to appoint additional counsel. The trial court held a hearing on the motion, upon its filing, on February 3rd. Randall Fish, of the public defender's office was also present at the February 3rd hearing, when the trial court fully explained the situation to defendant:

> THE COURT: Mr. McCoy ... you have been declared indigent ... for purposes of being able to get mitigation experts. There is a Supreme Court rule that is out there that states that if you're declared indigent that you have the right to counsel, which you've already been advised of that right to counsel, that you would be given—Mr. English would still be your counsel but that ... death qualified attorneys would be

appointed to represent you in this matter. That would come through the public defender's office, which they would appoint death qualified personnel to be able to represent you in this case. Mr. Marvin has asked that those two people be qualified and that you be appointed through the public defender's office death qualified individuals. That usually comes through CAPOLA, which is the Capital Assistance Program if I'm stating that correctly, and CAPOLA would be appointed and determine who those counsels are ...

[DISTRICT ATTORNEY]: I think that the Court should ... appoint the public defender's office with instructions that it should appoint two death qualified people and there may be one from this local PDO and one from CAPOLA or maybe more tha[n] one.

* * *

MR. ENGLISH: ... Mr. McCoy has an objection ... if the counsels come from the public defender's office here locally. I have explained to him that ... more likely than not ... that those two attorneys would be appointed from the Louisiana Capital Defense Association. Which means they ... do not work for the public defender's office. They are death penalty qualified. More likely than not they will be two attorneys in private practice who ... work with this association. And that the public defender's office will merely be retaining those people. But nobody from the local public defender's office will be involved in this case and ... would the local public defender's office agree with that?

* * *

MR. FISH: Randall Fish, on behalf of the public defender's office. Your Honor, at this time we don't know. As far as I know a capital case through the public defender's office would be assigned to me and Larrion Hillman. I don't know, at this point, I certainly don't know that the Capital Assistance Project would be secured through the public defender's office ... at the present time. And in addition, we may or may not seek ... review of being appointed in addition to Mr. English. That's something I have to discuss with Ms. Smart and make a decision on in the next day or two. But I do see some practical problems with appointed counsel being appointed in addition to private counsel .... [I]f we're to be appointed, I think it should be our responsibility to solely handle the defense of the case and not share that responsibility with Mr. English.

* * *

MR. ENGLISH: Your Honor, the Second Circuit made a certain suggestion, the D.A. has filed a motion ... I don't object to additional counsel being appointed to support me. [M]y ego is not such as that .... I'm confident that under the facts of this case that I can do what needs to be done. But certainly having two additional attorneys in no way offends me. Mr. McCoy, Your Honor, does not believe ... that the public defender's office will adequately represent him .... He would not have any problems, Your Honor, if the lawyers come from the Louisiana Capital Defense Association. In light of

everything that Mr. Fish has said ... I have no response ... to that. I'm simply trying to communicate where I believe my client's position is .... I personally do not have any problem and recommended to Mr. McCoy that you cannot have to[o] many lawyers in a case like this .... I'm perfectly comfortable proceeding as a single attorney because I'm relying upon the expertise—there are other ... capital defense lawyers who have been providing me expertise and direction in this case. I understand it is a capital case; I feel confident ... that I can represent Mr. McCoy. But I welcome any help if the Court so deems so and the district attorney's office deems so. The problem is with Mr. McCoy, Your Honor, ... he doesn't have any confidence in the public defender's office.

THE COURT: All right. Mr. McCoy?

MR. ENGLISH: Have I said that correctly, Mr. McCoy?

MR. MCCOY: You're exactly right, sir.

THE COURT: ... The district attorney has asked that additional capital qualified personnel be appointed to represent you, sir. And I am entertaining that motion at the present time. The only way that I can appoint anybody is that it has to be appointed through the public defender's office. And the public defender's office would of course decide who would be capital qualified to be able to represent you, and assist Mr. English, that is my option. From listening to Mr. English you're stating that you want Mr. English and Mr. English alone to represent you and you do not want the public de-

fender's office to represent you. Is that what this Court is hearing?

MR. MCCOY: Well what I'm saying today, Your Honor, I would love, you know, to have my prior representation of Mr. English but the assistance of the public defender board, no, sir, it's not needed by myself. I have no confidence in the public defender board. I've had prior run-ins with the public defender board. And if I'm not mistaken, Judge, I mean, please correct me if I'm wrong, there are some outside officials that can be retained through the—the Louisiana Association for other conflict of interest attorneys, Your Honor. I mean, this is my life, Your Honor .... I understand the statements ... that are validated before the Court, Your Honor, but I have no second chance at this, Your Honor. And I don't want the Court to put counsel on me, Your Honor, that I don't want. I object of this, Your Honor.

* * *

[Mr. English confers with Mr. McCoy off the record.]

* * *

THE COURT: Mr. McCoy, are you telling this Court that you fully waive the public defender's office being appointed? Understanding that Mr. English is not capital qualified. And that you waive these two attorneys, I mean, you waive the Court appointing the public defender's office with capital qualified attorneys to be sitting on this case? Is that what you're telling this Court?

MR. MCCOY: Your Honor, I'm telling this Court today that I am confident with Mr. English but with other legal assistance beyond the public defender's office, Your Honor. Beyond the public defender's office, Your Honor. Because if they was to appoint me—Your Honor, this is to better represent the Court as well. If they were to appoint me some counsel from the public defender's office, I'm going to fire them, Your Honor. I'm just putting it qualified on the record; I'm going to fire them.

THE COURT: So you are waiving any representation by the public defender's office fully and voluntarily, is that what I hear you say?

MR. MCCOY: Yes, I don't want anybody from the public defender's office, Your Honor. But beyond the public defender's office, Your Honor, conflict of interest attorney, I will accept ... from the Louisiana Defense Association of the Capital Association, I will accept, Your Honor.

THE COURT: Mr. McCoy, I don't have that authority. The only authority I can do is appoint the public defender's office. I will ask you again, are you fully, and knowingly, and voluntarily waiving the public defender's office to be appointed as co-counsel with Mr. English?

MR. MCCOY: Yes, I am, Your Honor.

Thereafter, the defendant acknowledged that he did not know who the public defender's office might assign to his case, but he reiterated that he had past dealings with Mr. Fish and Ms. Smart, and consequently, he did not want as counsel any representative from the public defender's office, even someone he had never known

before. The district attorney re-emphasized the rationale underlying Rule XXXI to the defendant:

> [DISTRICT ATTORNEY]: ... And you understand the reason the Court is trying to appoint two lawyers is if you end up being found guilty and this case proceeds into the penalty phase to determine whether you end up with a death penalty or life in prison. The reason the Supreme Court rule says that you should appoint two attorneys is because that attorney that handled the guilt phase of the trial has failed .... And the jury might possibly have lost confidence in anything that he or she says and not believe them. So in the penalty phase when that same lawyer stands up there and says, ladies and gentlemen, you only have two options here give my client death or give him a life sentence. There is no not guilty at that point.

The defendant responded affirmatively, indicating, "Uh-huh." The district attorney then asked the defendant, "Do you understand that if the Court appoints the public defender's office and you end up with two lawyers that you don't like ... you always have the right to terminate those lawyers?" The defendant answered:

> MR. MCCOY: Yes, sir. I just spoke that on the record; I'm fully aware of that. But the repercussions of that is this is time consuming .... and most of all ... that is against my best judgment ... to even obtain someone that I have no confidence in whatsoever ....

Thereafter, the trial judge reiterated the purpose of appointing two attorneys to represent an indigent capital defendant and then asked for the defendant's confirmation:

THE COURT: Mr. McCoy, [the district attorney] has covered, like I tried to cover with you, what the Supreme Court is stating. The Supreme Court has stated that ... for some reason you go into the guilt phase and they find you guilty, and then it goes to a penalty phase. If Mr. English is the only attorney the Supreme Court has stated that he may lose creditability and that may affect you in the penalty phase as [the district attorney] has stated before. That is the reason behind the Supreme Court statute .... My only recourse is to appoint the public defender's office. Do you want me to appoint the public defender's office as second counsel?

MR. MCCOY: For the record, again, Your Honor, I'm totally opposed to that and most of all, Your Honor. I mean, if you really look at it, Your Honor, I choose not to be strong armed to take a public defender's aspect of secondary counsel when that's totally against my wishes, Your Honor. I know the Court by verbatim can work some other appointment of capital specialist out—other than the public defender board, Your Honor. Because the public defender board may can finance someone through the public defender's office to represent me in another ... jurisdiction.

THE COURT: The only option ... this Court has is once you're declared indigent is to appoint the public defender's office. You understand all of your rights, is that correct, Mr. McCoy?

MR. MCCOY: That's exactly correct, Your Honor.

> THE COURT: You understand that you have the right to have another attorney appointed to represent you through the public defender's office, is that correct?
>
> MR. MCCOY: Yes, sir, but I don't want that, Your Honor.
>
> THE COURT: And you are fully and voluntarily waiving those rights, is that correct?
>
> MR. MCCOY: I'm waiving the right of someone from the public defender's office representing me, Your Honor, because—
>
> THE COURT: And you're doing that knowingly and voluntarily, is that correct?
>
> MR. MCCOY: Yes, sir.
>
> THE COURT: All right, thank you, sir. Then I will not appoint the public defender's office at this time ....

Nevertheless, the defendant now suggests that, even after these comprehensive exchanges, he "was denied" the right to qualified counsel based on an "inadequate waiver."

Importantly, Rule XXXI does not create a statutory right to two attorneys for indigents facing a capital trial. "The Rules shall not be construed to confer substantive or procedural rights in favor of any accused beyond those rights recognized or granted by the United States Constitution, the Louisiana Constitution, the laws of the state, and the jurisprudence of the courts." Louisiana Supreme Court Rule XXXI(B).[40] In *State v.*

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[40] We note that the language of Rule XXXI expressly states that "[i]n all capital cases, the following ***standards*** shall be applicable to the defense of indigents ...." (Emphasis added.)

Jones, 97–2593 at pp. 5–6, 707 So.2d at 978, the trial court faced the same situation and determined that for purposes of Rule XXXI, co-counsel could be appointed notwithstanding that the Jones defendant had a retained, and subsequently pro bono, counsel, presaging the scenario at hand:

> It is plainly preferable to have two attorneys in a capital case and we find no reason that the presence of collaterally retained private counsel should eliminate the need or countermand the advantages of two. Further, we can discern no reasoning nor find authority for the proposition that an indigent defendant is entitled to two State-funded attorneys, but an indigent defendant who has retained counsel from a collateral source is not entitled to a second counsel. Certainly, it is in the best interest of the taxpayer to encourage collaterally obtained counsel at no cost to the public fisc. It would therefore defy logic to punish such a defendant by refusing to appoint co-counsel because he has, in effect, saved IDB funds through retention of private counsel.
>
> However, we reiterate that an indigent capital defendant has no recognized right to two attorneys and in some cases may not desire a second appointed counsel. In such a case, it would be unjust to require a defendant to accept appointed counsel along with his retained counsel. Because there is no right to second counsel, because a defendant may oppose the appointment, and because other unforeseen reasons may weigh against appointment of second counsel, such an appointment is left to the discretion of the trial court.

In the subsequent case of *State v. Koon*, 96–1208 (La. 5/20/97), 704 So.2d 756, cert. denied, 522 U.S. 1001, 118 S.Ct. 570, 139 L.Ed.2d 410 (1997), the defendant claimed he was denied the assistance of co-counsel to which he was entitled under Rule XXXI. Like the instant defendant, the *Koon* defendant became unhappy with his public defender early on, and the trial court appointed a solo practitioner as lead counsel, and the lead defense counsel recruited a second attorney who later abandoned the case, leaving Koon with only his original defense counsel to try the case. *Koon*, 96–1208 at pp. 20–21, 704 So.2d at 769. The *Koon* defendant waived a second defense counsel, and this court affirmed his conviction and death sentence, noting that Rule XXXI "does not give rise to an affirmative right to multiple attorneys in capital trials." *Koon*, 96–1208 at p. 21, 704 So.2d at 769. The court found that Koon had waived the right to co-counsel after discussion with his original defense counsel and advisement by the judge. *Id.*

Koon's subsequent counseled post-conviction application, raising ineffective assistance of trial counsel, based in part on the absence of a second trial counsel, was denied, and this court denied certiorari. *State ex rel. Koon v. State*, 3–93–1268 (19th J.D.C. 3/21/00), *writ denied*, 00–1205 (La. 1/26/01), 781 So.2d 1258. However, over a decade after his capital trial, Koon's conviction for three counts of first degree murder and his death sentence were vacated on federal habeas review for ineffective assistance of counsel. In granting Koon's petition for writ of habeas corpus, the federal district court observed that Koon's private counsel rendered ineffective assistance in four respects; the most egregious omission was that defense counsel failed to interview and investigate the only known witness to the crime.

Koon v. Cain, 2007 U.S. Dist. LEXIS 97113, *26–30 (M.D. La. Feb. 1, 2007). The federal court also relied on the fact that defense counsel: (1) presented a mental-health/status defense at trial, yet only hired his chief expert witness on the issue one day before trial; (2) failed to use the assistance of co-counsel; and (3) failed to adequately prepare Koon for testimony at trial. Koon v. Cain, 2007 U.S. Dist. LEXIS 97112 *2 (M.D. La. Apr. 11, 2007). The Koon court found that counsel's decision to proceed to trial alone without the aid of at least one other attorney was part of the basis of its ruling, observing that "although an 'affirmative right' to two attorneys may not exist in Louisiana, defense counsel's refusal to be assisted by competent co-counsel can factor into the ineffective assistance analysis." *Koon v. Cain*, 2007 U.S. Dist. LEXIS 97113 at *31–32. The Fifth Circuit affirmed the district court's ruling. *Koon v. Cain*, 277 Fed.Appx. 381 (5th Cir. 2008).

Importantly, the federal district court granted habeas relief in *Koon v. Cain* on February 1, 2007, some seven months before the Louisiana Public Defender Act of 2007 became effective, and over three years before the Capital Defense Guidelines (La. Admin. Code, Title 22, Section 901 et seq.) were promulgated in May 2010, as discussed hereinafter. The statutory enactments, LSA–R.S. 15:141–184, and Capital Defense Guidelines became effective after *Koon v. Cain* and suggest that *Koon* may be distinguishable from the instant case, given those statutes and guidelines place the ongoing responsibility for filling out the defense team on the state public defender, which was not the statutory landscape when *Koon v. Cain* was decided.

Notably, *Koon v. Cain* presented a case of ineffective assistance of counsel, decided under the principles announced in *Strickland v. Washington*, 466 U.S. 668,

104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). By appellate counsel's choice, he specifically has not raised a claim of ineffectiveness of counsel in this direct appeal, and thus, such a claim is not before the court.

In the present case, at the hearing on the motion for new trial, John Di Giulio of the Louisiana Public Defender Board ("LPDB"), formerly the Louisiana Indigent Defense Assistance Board ("LIDAB"), was called as a witness. Mr. Di Giulio testified that Randall Fish's objection, on behalf of the local public defender's office, to being appointed alongside retained counsel (Mr. English) was inconsistent with the Capital Defense Guidelines, enacted in May 2010, approximately one year before the defendant's capital trial.

Mr. Di Giulio explained that under the Capital Defense Guidelines, the district public defender or the state office is responsible for supplying the additional resources to bring the defense team into compliance with the guidelines, even for a capital defendant with retained or pro bono counsel. He stated that the minimum compliance for capital defense is two counsel, at least one of whom is certified as a capital defense qualified lead counsel. Mr. Di Giulio testified that his office provides supervision of capital trial counsel, receives monthly reports of every capital trial in the state, and contracts with a number of non-profit corporations to provide indigent capital defense. Mr. Di Giulio testified specifically that Randall Fish, in objecting to the local public defender's office being appointed as co-counsel to serve alongside Mr. English, expressed a position inconsistent with the guidelines and, thus, was not accurate. According to Mr. Di Giulio, the notion expressed by the trial judge in this case—that co-counsel would have to be appointed *from* the local public defender's office—seemed to be the understanding of the parties

at the time, but it was not the only option. Mr. Di Giulio posited that, in a case such as the present one—when the local public defender's office had been involved and then removed—it would have been more appropriate to contact the LPDB office, which could have appointed one of its contract program attorneys, who do trial level work all over the state, to assist in the case. Mr. Di Giulio suggested that, even in a case in which the defendant has a private attorney, the Capital Defense Guidelines would still apply to remedy a deficiency if a determination of indigency has been made. Mr. Di Giulio indicated that, in a situation in which the public defender's office has "an inability to get along with the defendant," the state public defender's office could appoint one of their 501(c) attorneys to either assist or replace trial counsel.

Of particular interest to the instant case is § 905(B)(1) of the Capital Defense Guidelines, which states, "The district public defender, regional director and state public defender are to be independent of the judiciary and they, not the judiciary or elected officials, shall select lawyers for specific cases." 22 La. Admin. Code, Part XV, § 905(B)(1). Also, the guidelines require "the district public defender, regional director or state public defender, as appropriate, [to] be responsible for supplementing existing services available to the defendant to meet the requirements of this Section." 22 La. Admin. Code, Part XV, § 913(C)(2). In addition, 22 La. Admin. Code, Part XV, § 905(D)(1) states, "In any circumstance in which the performance of a duty under this Section would result in a conflict of interest, the relevant duty should be performed by the state public defender, a defender organization or independent authority free of a conflict of interest and identified for this purpose in the Capital Representation Plan."

Further, the guidelines provide that "[c]ounsel shall not be assigned to a defendant who indicates that he does not wish to receive public defender services." 22 La. Admin. Code, Part XV, § 911(C)(4). Thus, as these provisions and the testimony of LPDB witness John Di Giulio affirmed, if the instant defendant were entitled to conflict counsel, the starting point would necessarily be via referral by the district public defender to the LPDB regional director and/or the state public defender. The February 3, 2011 colloquy shows the difficulty the parties had in explaining that reality to the defendant because he vehemently rejected anything involving the "public defender."

Based on the absence of trial co-counsel, the defendant's appellate counsel urges that the defendant should be granted a new trial as to both the guilt and penalty phases of trial. The State maintains no new trial is warranted, arguing during the hearing on the motion for new trial, "[I]t's real convenient now to come back and say, well, we've got all [these] problems, the ones that are all protected by attorney-client privilege so there's no way anybody could have known that but they were such of big magnitude that I was effectively denied my right to a lawyer, so that's where we are."

The record presented in this case demonstrates that the defendant could not have been more resolute in declaring that the appointment of co-counsel through the public defender's office was unacceptable to him.

The trial court clearly informed the defendant that a second co-counsel would be appointed "through the public defender's office"; this statement was in compliance with the Capital Defense Guidelines, which, as stated above, directs in § 905(B)(1) that the district

public defender, regional director, and state public defender, not the judiciary or elected officials, select lawyers for specific cases and, when there is a conflict of interest, § 911(C)(4) directs that the state public defender, a defender organization or independent authority free of a conflict of interest must undertake the indigent defense. Implicit in the delivery of indigent defense organizational structure is that a claim of conflict is evaluated within the public defender hierarchy by "the appropriate non-conflicted authority," as stated in § 911(E)(1), and, if a conflict is found, the case is referred to an attorney hired by the LPDB for conflict-free representation.

Notwithstanding, the defendant in this case steadfastly persisted in rejecting any participation of the "public defender" in his defense, stating at the February 3, 2011 hearing on the issue that he did not need "the assistance of the public defender board" and that he had "no confidence in the public defender board."

This court has previously indicated that a trial court would be "unjust" in compelling a defendant to accept a second indigent defender along with his retained counsel, when he has expressed opposition to such, in *State v. Jones*, 97–2593 at p. 6, 707 So.2d at 978 ("[I]n some cases [a defendant] may not desire a second appointed counsel. In such a case, it would be unjust to require a defendant to accept appointed counsel along with his retained counsel."). Moreover, the decision of whether or not to appoint counsel to an indigent defendant is reviewed under the abuse of discretion standard. *Id.* ("Because there is no right to second counsel, because a defendant may oppose the appointment, and because other unforeseen reasons may weigh against appointment of second counsel, such an appointment is left to the discretion of the trial court.").

Under the particular facts and circumstances of this case, we find no abuse of discretion in the trial court's failure to appoint a second trial counsel, and there is no merit in this assignment of error.

Motion to Suppress

In his ninth assignment of error, the defendant contends that the trial court erred in refusing to grant his pro se motion to suppress the pretrial statement given by his friend and neighbor, Gayle Bernard Houston, because the statement was coerced. This handwritten motion was entitled "Motion to Suppress Evidence & Motion for Acquittal/Dismissal" and was filed in the trial court by the defendant on April 8, 2009. The motion stated, in pertinent part:

> State of Louisiana—Detectives of Bossier City Police ... violated said suspects Spartacus McCoy; Carlos McCoy; and neighbor Gale Houston's 6th Amendment right to counsel by interrogating them without their lawyer present and/or forcing/pressuring them to make a false confession ....
>
> * * *
>
> ... Gale Houston stated: "He only did and said what was told of him", "so he too wouldn't be incarcerated." Law states: "that no suspect should be forced; threatened; co-hearsed [sic]; and coached to make any statement in which they do not want to make ..." "Violation of 5th Amendment right and numerous civil rights by law enforcement officials ... Suspect was also intoxicated."

On July 21, 2009 the trial judge ruled on the defendant's motion in pertinent part as follows:

> First, this Court will address Petitioner's "Motion to Suppress Evidence." Petitioner fails to adhere to the time limitations provided for such a motion in Arts. 703 and 521 of the Code of Criminal Procedure. Such a motion should be filed within 15 days after arraignment. Petitioner has not done so. Petitioner was arraigned on June 17, 2008 and Petitioner's "Motion to Suppress" was filed on April 8, 2009. While the court has such discretion to allow an untimely "Motion to Suppress," the burden of proof is on the defendant to prove the ground of his motion, which he has not done so in this case. Therefore, for the foregoing reasons, Petitioner's Motion to Suppress is DENIED.

The defendant faults the trial court for setting a series of new filing deadlines for motions to be filed even after it denied the defendant's pro se filing as untimely, noting that the trial court set motions to be heard up to December 28, 2010, and the defendant's trial did not commence until July 28, 2011, some two years after the defendant's motion to suppress was denied as untimely. Counsel suggests that the judge's denial was "arbitrary and unfairly targeted [defendant's] pro se filings."

Importantly, LSA–C.Cr.P. art. 17 vests in the trial court "all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders .... It has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done." Further, LSA–C.Cr.P. art. 521(A) provides: "Pretrial motions shall be made or filed within fifteen days after arraignment, unless a different time is provided by law or fixed by the court at arraignment upon a showing of good cause why fifteen days is inad-

equate." In addition, LSA–C.Cr.P. art. 703(C) governs motions to suppress evidence and provides:

> A motion filed under the provisions of this Article must be filed in accordance with Article 521, unless opportunity therefor did not exist or neither the defendant nor his counsel was aware of the existence of the evidence or the ground of the motion, or unless the failure to file the motion was otherwise excusable. The court in its discretion may permit the filing of a motion to suppress at any time before or during the trial.

The purpose of these rules is to prevent interruption of trials, avoid the effort and expense of useless trials, and to protect juries from exposure to inadmissible evidence. *State v. Taylor*, 363 So.2d 699, 702 (La. 1978).

In the present case, the defendant filed numerous pro se motions and subpoena requests and also initiated disciplinary complaints against Mr. English. The district attorney asserted that the defendant's actions were "meant to harass and unduly delay this matter." The attorneys who represented the defendant actively sought to curtail his pro se filings. At every opportunity, Mr. English advised the trial court that he did not adopt the defendant's motions or subpoena requests. When Mr. English first enrolled as counsel, he expressed optimism in representing the defendant: "Based upon our conversations, I'm confident that he will rely on my counsel and allow me to be the counsel in this case. We had a very candid conversation about this. That I would be the only voice from this day forward speaking for Mr. McCoy." That optimism faded over the intervening months, and trial counsel's frus-

tration was palpable at the hearing on January 4, 2011 because the defense was not speaking with one voice:

> MR. ENGLISH: I believe also, Your Honor, there was a Motion to Suppress Evidence that Mr. McCoy had filed and I'm looking at a ruling here and I don't see a date on it, but indicated that the Court would set a new date to hear his Motion to Suppress the Weapon, the Illegal Tape Recording, Confidential Communication without Accused's Knowledge and Consent, and a Coerced Confessions and State Dispositions. I have talked to Mr. McCoy. I ... told him that I don't believe that this motion has any value in this particular case and that it would be a waste of resources given what the evidence is. He has agreed and so we're not going to argue that motion either, Your Honor.
>
> THE COURT: All right, and that motion will be withdrawn at this time ....

In *State v. Bodley*, 394 So.2d 584, 593 (La. 1981), this court confronted a similar situation and reasoned that "[w]hile an indigent defendant has a right to counsel as well as the opposite right to represent himself, he has no constitutional right to be both represented and representative." The instant case is an example of a defendant who sought to be both represented and representative.

Notwithstanding, although Gayle Bernard Houston testified as a State witness, the pre-trial statement of Mr. Houston was not admitted into evidence; however, it was used to refresh his memory. Mr. Houston testified that he was a childhood friend of the defendant and he had known the defendant all of his life. Mr. Houston related to the jury that on the night of May 5, 2008, he

and his brother picked up the defendant and his brother, Spartacus McCoy (who was deceased by the time of trial), in downtown Shreveport. Mr. Houston further testified that he and his brother went to pick the defendant up because the defendant's brother had sounded upset so they "decided to see what was going on." Mr. Houston disclosed that when the defendant got into his car "he was just quiet and—and then eventually he just said, you know, he 'F'd' up and we was all trying to figure out what—what you done 'F'd' up." Mr. Houston repeated several times in his testimony that the defendant "looked normal" to him.

On further questioning by the district attorney, Mr. Houston seemed hesitant to repeat the entirety of the defendant's statements made on that date and, when asked about whether he had given a statement to police, Mr. Houston acknowledged that he had given a statement to Detective Brian Griffith on May 8, 2008. Referring to the transcript of that statement, Mr. Houston agreed that his memory was refreshed, and he was able to give additional details about the events of that evening. *See* LSA–C.E. art. 612(B) ("In a criminal case, any writing, recording, or object may be used by a witness to refresh his memory while testifying.").

Referencing Mr. Houston's statement to Detective Griffith, the district attorney asked Mr. Houston what he told the detective in relation to the defendant saying he "F'd up," to which Mr. Houston replied, "I said he done shot three people." The district attorney then read aloud from the statement in formulating his next questions to Houston, as reflected in the following colloquy:

> [DISTRICT ATTORNEY:] ... [A]round in the middle of that page you said, "He wouldn't ex-

> plain why or he—he just wouldn't explain nothing. He just said that he shot three people. I done F'd up. I'm not going back to jail, Gayle." That's you right?
>
> [MR. HOUSTON:] Yes.
>
> [DISTRICT ATTORNEY:] "Robert, you need to turn yourself in." "I'm not going back to jail." Do you remember him saying that to you?
>
> * * *
>
> [MR. HOUSTON:] Now, you know, like I said, when I'm doing my statement, you know, I—I been drinking and I could have everything backwards.

Mr. Houston also stated that he could only say for sure that the defendant stated that he "F'd up." Mr. Houston explained that he could have heard the other statements, which he reported to police as having been made by the defendant, from other people, instead of directly from the defendant.

Thereafter, Mr. English cross-examined Mr. Houston, quoting verbatim from his statement, asking, "After reading this statement do you still say Robert was acting normal or was he crying that night?" Mr. Houston again responded that the defendant was "acting normal." The following colloquy ensued:

> [MR. ENGLISH:] ... On a direct question from [the district attorney], you stated that Mr. McCoy was acting normal, correct?
>
> [MR. HOUSTON:] Yes.
>
> [MR. ENGLISH:] But in your statement to the police you told him he was crying, correct?

[MR. HOUSTON:] Yes.

[MR. ENGLISH:] Which one was it?

[MR. HOUSTON:] Crying.

Mr. English then propounded a line of inquiry submitted by the defendant:

> [MR. ENGLISH:] Now, did you lie to the Bossier—What you said in this statement, now, even though you don't remember it, did you lie to the police department?
>
> [MR. HOUSTON:] No.
>
> [MR. ENGLISH:] ... Mr. McCoy wants to know did you tell his father that the detectives had coached you and you made all of this up?
>
> [MR. HOUSTON:] No.
>
> [MR. ENGLISH:] Okay. Mr. Houston, you indicated that you were drinking, correct?
>
> [MR. HOUSTON:] Yes.
>
> [MR. ENGLISH:] And the—the—This is a legitimate question. The fact that you were drinking, would that have clouded your recollection in any way of what Mr. McCoy did or did not do?
>
> [MR. HOUSTON:] No ....

In support of this assignment of error, the defendant cites this court's decision in *State ex rel. Johnson v. Maggio*, 440 So.2d 1336, 1337 (La. 1983) (per curiam), for the proposition that a pro se petitioner "is not to be denied access to the courts for review of his case on the merits by the overzealous application of form and pleading requirements or hyper-technical interpreta-

tions of court rules." *State ex rel. Johnson* involved appellate review of a habeas corpus proceeding following the pro se applicant's conviction for criminal mischief, which was in contrast to the instant proceeding wherein the defendant attempted to act both pro se and via trial counsel.

Under the instant circumstances, we conclude that any error of the trial court in denying the defendant's pro se motion to suppress the statement of Gayle Houston was harmless since the written statement was not introduced into evidence, but rather was used only to refresh the memory of Gayle Houston during his trial testimony, pursuant to LSA–C.E. art. 612(B), and since there was no contemporaneous objection made to the use of the statement at trial. We expressly note that defense counsel also used the statement to refresh the witness's memory on cross-examination. Furthermore, there was no motion by either the district attorney or defense counsel to introduce any part of the statement into evidence. This assignment of error fails on the merits.

Voir Dire

In the defendant's tenth assignment of error, he argues that the State's exercise of peremptory challenges as to prospective jurors was based on race, in violation of the U.S. and Louisiana Constitutions, as well as LSA–C.Cr.P. art. 795(C) ("No peremptory challenge made by the state or the defendant shall be based solely upon the race or gender of the juror."), necessitating a new trial.

The discriminatory use of peremptory challenges by a prosecutor to exclude potential jurors based solely on race has long been considered a constitutional viola-

tion. *Batson v. Kentucky*, 476 U.S. 79, 84–85, 106 S.Ct. 1712, 1716–17, 90 L.Ed.2d 69 (1986); *Swain v. Alabama*, 380 U.S. 202, 203–04, 85 S.Ct. 824, 826–27, 13 L.Ed.2d 759 (1965). The *Batson* court outlined a three-step process for a trial court to use in evaluating a claim that a peremptory challenge was based on race. *Snyder v. Louisiana*, 552 U.S. 472, 476, 128 S.Ct. 1203, 1207, 170 L.Ed.2d 175 (2008); *State v. Nelson*, 10–1724, p. 9 (La. 3/13/12), 85 So.3d 21, 28. Under *Batson* and its progeny, the opponent of a peremptory strike must first establish a prima facie case of purposeful discrimination. *State v. Nelson*, 10–1724 at p. 9, 85 So.3d at 28–29. Second, if a prima facie showing is made, the burden shifts to the State to articulate a race neutral explanation for the challenge. *Id.*, 10–1724 at p. 9, 85 So.3d at 29. Third, the trial court then must determine if the opponent of the strike has carried the ultimate burden of proving purposeful discrimination. *Id.* (citing *Batson*, 476 U.S. at 98, 106 S.Ct. at 1724).

This final step involves evaluating "the persuasiveness of the justification" proffered by the striking party, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *State v. Nelson*, 10–1724 at p. 15, 85 So.3d at 32 (quoting *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 1771, 131 L.Ed.2d 834 (1995) (per curiam)). Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. *Purkett v. Elem*, 514 U.S. at 768, 115 S.Ct. at 1771; *Hernandez*, 500 U.S. at 359, 111 S.Ct. at 1866.

Since the trial judge's factual findings in the context of evaluating discriminatory intent largely turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Hernandez*

v. New York, 500 U.S. 352, 364, 111 S.Ct. 1859, 1869, 114 L.Ed.2d 395 (1991); *Batson*, 476 U.S. at 98, n. 21, 106 S.Ct. at 1724, n. 21. A trial court's ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous. *Snyder v. Louisiana*, 552 U.S. at 477, 128 S.Ct. at 1207. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Hernandez v. New York*, 500 U.S. at 369, 111 S.Ct. at 1871.

In the instant case, following a *Witherspoon*[41] qualification, ninety-four prospective jurors remained in the venire, and those prospective jurors were further divided into panels of seven prospective jurors, each, for general voir dire questioning. The parties questioned eight full panels and two prospective jurors from the ninth panel to complete jury selection of twelve jurors and two alternate jurors. Of those fifty-eight prospective jurors, ten appear to have been African–American: Ms. Curry, Ms. Venus, Ms. Eason, Ms. Thomas, Mr. Burks, Mr. Mitchell, Mr. Burrell, Mr. Landry, Mr. Small, and Ms. McWashington. According to the defendant, the jury was composed of eleven Caucasian jurors and one African–American juror, and the two alternate jurors were Caucasian.

Three *Batson* challenges were made by the defense, respecting peremptory strikes made by the State as to prospective jurors Ms. Curry, Mr. Landry, and Ms. McWashington. The defendant now contends that, in denying these challenges, the trial court relied on incorrect factual bases, failed to assess the credibility of

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[41] *See Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) (holding that a prospective juror who under no circumstances would vote to impose the death penalty, instead voting automatically for a life sentence, is properly excluded).

the State's proffered race neutral reasons in light of disparate treatment of similarly-situated white jurors and other evidence of discriminatory intent, and failed to "have regard for" the State's strike of the "jointly struck juror, Ms. Venus."

During voir dire in this case, the first peremptory strike against an African–American, Ms. Curry, was made upon completion of questioning of the first panel of prospective jurors. Afterward, following the questioning of the second and third panels, the State and the defense both exercised a peremptory back-strike to remove first panel prospective juror Ms. Venus, making her the second African–American removed by a peremptory strike (the two other African–Americans previously removed were removed "for cause," not peremptorily).

After the back-strike of Ms. Venus, the defense raised its first *Batson* claim. The defense urged that there had been a clear pattern of striking African–American jurors by the State. The district attorney responded that Ms. Venus could not be considered as part of a pattern of racially discriminatory strikes when the defense also submitted a peremptory strike against her. Mr. English, in essence, asserted that, because Ms. Venus was a "strongly pro-death penalty" juror, she favored the prosecution, such that the only reason the district attorney could have had for striking her was the fact that she was African–American. Mr. English also conceded that he was not seeking to have Ms. Venus returned to the jury venire; however, the State's strike of Ms. Venus, as the second peremptory strike of an African–American in the trial, gave him a basis upon which to contend that there was a pattern of racially discriminatory strikes and that the previously-stricken African–American, Ms. Curry, should be returned to

the jury venire. The trial judge reviewed the voir dire up to that point and did not perceive a pattern of discriminatory strikes on the State's part; thus, the trial judge did not require the State to make a race neutral articulation at that time. Nevertheless, the district attorney volunteered that the contents of Ms. Curry's juror questionnaire "are clear as to the reason she was struck."

The fourth and fifth panels of prospective jurors were questioned together and, of those fourteen prospective jurors, three were African–American—Mr. Burks, Mr. Burrell, and Mr. Mitchell. At the conclusion of questioning, the State challenged Mr. Burks for cause, based on his opposition to the death penalty, which the trial court granted without objection by the defense. The State then submitted a challenge for cause as to Mr. Burrell, based on his personal knowledge of the case and of the victims, and the defense did not enter a formal objection. Mr. Mitchell was selected from these panels to serve as the only African–American juror in this case.

Following the examination of the seventh panel of prospective jurors, the State exercised its twelfth peremptory challenge to excuse Mr. Landry, and the defense then urged its second *Batson* claim. Mr. English urged, "I believe that there's a clear pattern of [the district attorney] striking African–Americans from this jury. I think that Ms. Curry should be brought back in and should be placed back on this jury, Judge." The trial judge then noted that there had been three African–American jurors peremptorily struck, at that point, stating:

> Ms. Curry was the first—She was a black female that was struck. Ms. Venus, however,

> was struck by both Mr. English and Mr. Marvin at the same time .... And I will take note of that. I will state that there is a black male [Mr. Landry] that was finally struck by Mr. Marvin. I will let Mr. Marvin state any race-neutral reasons that he has and I will take those into consideration ....

Before the district attorney began articulating his neutral reasons for his peremptory challenges, he argued that Ms. Venus should not be considered as part of a pattern of racial discrimination, for purposes of evaluating the *Batson* challenge, given that both sides struck her, stating, "The remedy of *Batson* is to put the person back on the jury, okay. Do you want her back?" Mr. English responded that, while he did not seek to reseat Ms. Venus, he thought that both Ms. Curry and Mr. Landry should be placed back on the jury.

The district attorney offered as his reason for peremptorily striking Ms. Curry, her responses on the juror questionnaire, which established that she was "personally, morally, or religiously opposed to the death penalty and will always vote to impose life sentence." The trial court accepted the State's reasons for striking Ms. Curry as race neutral and denied the *Batson* claim as to her. As for Mr. Landry, the district attorney pointed to the fact that Mr. Landry did not answer most of the multiple questions on his juror questionnaire pertaining to the death penalty, that the death penalty sections were the only sections in the juror questionnaire that Mr. Landry did not fill out, and that Mr. Landry's failure to fill out the death penalty sections of the juror questionnaire indicated that he must have had "some kind of reservation about the death penalty." Mr. English countered that he thought Mr. Landry's statements during voir dire were so strongly

in favor of the death penalty that he had Mr. Landry on his list to strike because "he would not be favorable to my side." The trial court ruled that the district attorney had stated "a race-neutral reason" and denied the *Batson* claim over the objection of the defense.

At the conclusion of the examination of the seventh panel of prospective jurors, twelve jurors had been selected and placed under the rule of sequestration. An eighth panel of prospective jurors was then brought in for the selection of the alternate jurors; in that panel were two African–Americans, Mr. Small and Ms. McWashington. The defense challenged Mr. Small for cause because he had been a high school classmate of Gregory Colston's, and the challenge for cause was granted by the trial court.

Thereafter, the State peremptorily struck Ms. McWashington, and the defense then made its third *Batson* claim. As a race neutral reason for his peremptory challenge, the district attorney pointed to Ms. McWashington's statement that Officer Richard McGee had been pastor of her church for the preceding four or five years. The district Attorney further stated:

> Richard McGee is in these police reports. He is the man that Mr. English's client has accused of having an affair with his wife that provoked all this. I'm not going to let one of his parishioners sit on this jury .... If I'm not mistaken, one of the subpoenas that we've been arguing about weeks before was to Mr. McGee.

The district attorney further noted that Ms. McWashington had indicated that if Richard McGee were called to the stand as a witness, "she would tend to believe him" because "[h]e's her pastor." The trial court found that the State had articulated a race neutral reason un-

der *Batson*, and excused Ms. McWashington over defense objection.

Whether peremptorily striking three African-American jurors in the present case constitutes a prima facie pattern of discriminatory strikes is a question that becomes moot after the State provides race neutral reasons, pursuant to *Hernandez v. New York*, 500 U.S. at 359, 111 S.Ct. at 1866 ("Once a prosecutor has offered a race neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot."). A trial judge may therefore effectively collapse the first two stages of *Batson* and rule on the question of discriminatory intent without deciding the question of whether the defendant established a prima facie case of purposeful discrimination. *See State v. Nelson*, 10-1724 at p. 10, 85 So.3d at 29.

On appeal, the defendant concedes that Ms. Curry's strong aversion to capital punishment was a legitimate basis for the State to peremptorily strike Ms. Curry. We find no merit in the defendant's assertion that, when considered in context with the other State peremptory challenges, which he claims were race-based, the trial court erred in failing to grant the *Batson* challenge as to Ms. Curry. As shown hereinbelow, all of the peremptory challenges exercised by the State at trial arose from legitimate race neutral considerations.

During the *Witherspoon* voir dire, Ms. Curry declared unequivocally that "I am not for the death penalty .... I could consider it but I would always lean toward life." We conclude that the State's peremptory strike of Ms. Curry was justified given her pro-life sentence stance, and the trial court's ruling upholding the

State's strike is supported by precedent. *See State v. Williams*, 96–1023, p. 33 (La. 1/21/98), 708 So.2d 703, 727 (holding that the State's articulated reason for striking a prospective juror because she appeared "weak ... on the death penalty" was accepted as a race neutral reason) (quoting *United States v. Bentley–Smith*, 2 F.3d 1368, 1375 (5th Cir. 1993) ("The reason certainly is stronger if the attorney is able to articulate an objective fact, such as that the juror was slow in answering questions or had to have questions repeated .... [but] the judge is free, based upon all the information presented and that judge's eyewitness observation of counsel, to conclude that the reason is offered in good faith and not as a subterfuge for race.")). In this case, looking at the whole of Ms Curry's voir dire testimony, no racial animus was apparent in the making of this peremptory challenge. *See Miller–El v. Dretke*, 545 U.S. 231, 252, 125 S.Ct. 2317, 2332, 162 L.Ed.2d 196 (2005) (wherein the Supreme Court considered "[t]he whole of the voir dire testimony" to evaluate the prosecution's reasons for striking the juror at issue).

Further, the defendant's argument on appeal, that the State's peremptory challenge of Ms. Venus should be considered when evaluating the State's peremptory challenge of Ms. Curry, ignores the clear directives of LSA–C.Cr.P. art. 795(D) to the contrary, given that the defense simultaneously challenged the same juror. Although Paragraph (C) of Article 795 authorizes the trial court to demand a race neutral reason for the exercise of a peremptory challenge, unless the court is satisfied that such reason is apparent from the voir dire examination of the juror, Paragraph (D) of Article 795 provides that the "provisions of Paragraph C and this Paragraph shall not apply when both the state and the defense have exercised a challenge against the same

juror." Because Ms. Venus was peremptorily challenged by both the State and the defense, the trial court was not required to order the articulation of race neutral reasons, pursuant to LSA–C.Cr.P. art. 795(D), and we find no *Batson* violation apparent in the peremptory strike of Ms. Venus.

As to the *Batson* claim made after the peremptory challenge of Mr. Landry, the defendant argues that, when the district attorney in this case was concerned that the failure of Mr. Landry to answer juror questionnaire death penalty questions suggested his ambivalence about the death penalty, he should have asked additional questions about the matter and his failure to do so was an indication that the State's articulation of this reason in support of his peremptory strike against Mr. Landry was pretextual. On this point, the defense cites *Miller–El v. Dretke*, wherein the Supreme Court similarly reasoned, when a perceived conflict in a juror's position arose, "[W]e expect the prosecutor would have cleared up any misunderstanding by asking further questions before getting to the point of exercising a strike." *Miller–El v. Dretke*, 545 U.S. at 244, 125 S.Ct. at 2327. The defense also cites *State v. Harris*, 01–0408, p. 8 (La. 6/21/02), 820 So.2d 471, 476, and *State v. Collier*, 553 So.2d 815, 822 n.11 (La. 1989), which recognized that the failure of a prosecutor to question, or questioning in only a cursory manner, a prospective juror who is challenged on the basis of a claimed bias raises a strong inference that the juror was excluded on the basis of race alone. Notwithstanding, we note that *Miller–El v. Dretke* further directs:

> [T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evi-

> dence with a bearing on it. It is true that peremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives.

Miller–El v. Dretke, 545 U.S. at 251–52, 125 S.Ct. at 2331–32 (citations omitted). Indeed, in *Miller–El v. Dretke*, the Supreme Court noted that "we read [the juror's] voir dire testimony in its entirety." *Id.*, 545 U.S. at 247, 125 S.Ct. at 2329.

Turning to Mr. Landry's voir dire, "in its entirety," we conclude that the record supports the articulated reasons for the district attorney's exclusion of him. Mr. Landry's responses in the *Witherspoon* round, at the very least, lacked clarity and potentially demonstrated an inconsistency in his thought process. Mr. Landry's response to questioning by the district attorney presented a somewhat confused opinion about the death penalty:

> [DISTRICT ATTORNEY]: Tell me your views on the death penalty?
>
> MR LANDRY: I'd say give them life in prison.
>
> * * *
>
> [DISTRICT ATTORNEY]: Okay. Did I take that to mean you're opposed to the death penalty?
>
> MR. LANDRY: I would like to know what really he done to put him life in prison. Well put him in there, you know?

[DISTRICT ATTORNEY]: I'm having a little difficulty hear[ing] you.

MR LANDRY: I'd say I'd have to know what's going on in order to put him in there. To take the penalty, you know. To put him in penalty.

[DISTRICT ATTORNEY]: ... [C]an you consider the death penalty as an option ... as a verdict that you personally could ... render?

MR. LANDRY: I would say that, yeah.

[DISTRICT ATTORNEY]: Okay. And that you were saying you need to know factors about—

MR. LANDRY: What—right what he did and everything.

[DISTRICT ATTORNEY]: Okay. Well that's what the whole trial would be about.

MR. LANDRY: Yeah—yeah, before I put, you know, say about a penalty, death penalty and everything.

[DISTRICT ATTORNEY]: Okay. But—but do you see yourself as someone—let's just—let's go at it like this. Let's say you were in an argument with your best friend just a friendly argument about the death penalty .... And your best friend said the death penalty should be abolished; we should not have it in our law. What do you say back?

MR. LANDRY: I wouldn't go for it.

[DISTRICT ATTORNEY]: Why?

MR. LANDRY: Because I don't believe that, you know, the death penalty is good, you know.

> If he did the crime it's all right, and, you know, he did the crime. But if he didn't do the crime, well, you know, it's way just—you know.
>
> [DISTRICT ATTORNEY]: Okay. So you would take the position the death penalty should not be in our laws?
>
> MR. LANDRY: It should be in the law if you did it if you did the crime but if you didn't do the crime he shouldn't, you know, he shouldn't have it.
>
> [DISTRICT ATTORNEY]: Okay. Do you see yourself as someone that could vote to impose the death penalty and come back into the courtroom and say, yeah, that's my verdict?
>
> MR. LANDRY: Yeah.
>
> * * *
>
> [DISTRICT ATTORNEY]: Can you consider a life sentence too?
>
> MR. LANDRY: Yeah.

Ultimately, Mr. Landry concluded that he could consider both verdicts, a life sentence or a death sentence, and the district attorney did not issue a cause challenge as to Mr. Landry.

However, during general voir dire, the district attorney asked Mr. Landry, "[O]n your questionnaire there were a couple of sections on here regarding the death penalty. And I notice that you didn't answer .... So, tell me what your views are on the death penalty?" Mr. Landry's response seemed to indicate that he was expecting to see a video of the crime, when he stated, "I would really have to see what really happened and watch the films to see what was going on—or watch the

pictures." The district attorney pressed Mr. Landry for a definitive statement as to his opinion, asking, "Do you think the death penalty should be in our law?" Mr. Landry replied, "Well, if they did the crime, you know, it would be, you know." The district attorney then inquired, "If the death penalty is available and you're on a jury what are you looking for that would make you say ... the death penalty should be the punishment here?" Mr. Landry replied, "Well, when you look at it you'll probably be able to see what happened, you know, if he did the crime, killed the people, you know."

In explaining his reasons for striking Mr. Landry, the District Attorney stated:

> Mr. Landry did not fill out the form in either of the sections that only pertain to the death penalty. He refused to fill it out. He didn't check anything in there. So he had some kind of reservation about the death penalty. He may be the most pro-death penalty guy out there. I don't know. But I know he didn't fill out the form .... And that's the only two sections that he didn't fill out. He told us three times about his bad back and medical problems and what sports and what courses he took and his income range and everything else in there, but wouldn't answer the questions about the death penalty .... I'm trying to find folks that will sit on the jury that I think have the guts to impose the death penalty.

The defendant further contends that other prospective jurors, who were white and who omitted one or two of the death penalty questions, were not struck from the jury, indicating that this fact supports his claim that these other jurors were "similarly situated" to Mr. Landry, and yet, Mr. Landry received disparate

treatment.[42] However, the fact that the State did not strike similarly situated white jurors is not, alone, grounds to find the stated reason for the strike pretextual. *See State v. Juniors*, 03–2425, p. 31 (La. 6/29/05), 915 So.2d 291, 317–18, *cert. denied*, 547 U.S. 1115, 126 S.Ct. 1940, 164 L.Ed.2d 669 (2006) ("[T]he fact that a prosecutor excuses one person with a particular characteristic and not another similarly situated person does not in itself show that the prosecutor's explanation was a mere pretext for discrimination."); *State v. Collier*, 553 So.2d at 822 ("Other courts have rejected explanations for challenges when the prosecutor failed to challenge other jurors, not of the defendant's race, who shared the same characteristic as that claimed by the prosecutor as the reason for the challenge .... However, the fact that a prosecutor excuses one person with a particular characteristic ... and not another similarly situated person does not in itself show that the prosecutor's explanation was a mere pretext for discrimination. The accepted juror may have exhibited traits which the prosecutor could have reasonably believed would make him desirable as a juror.").

Looking at his voir dire testimony as a whole, Mr. Landry's *Witherspoon* responses and his general voir dire responses revealed repeated incidents of inconsistency about his opinion on the death penalty, which prompted the State to peremptorily exclude him. *See State v. Juniors*, 03–2425 at pp. 31–32, 915 So.2d at 318 (Although "an equivocal response in answer to whether [a prospective juror] could legitimately consider voting for death ... may not have risen to the level of a sustain-

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[42] We note that none of the white comparables disregarded death penalty question numbers 93 through 103, as Mr. Landry did on his juror questionnaire.

able challenge for cause, it does support the race-neutral reasons furnished by the State after defense counsel objected on *Batson* grounds to the peremptory strike against [the prospective juror]."). *See also Uttecht v. Brown*, 551 U.S. 1, 7, 127 S.Ct. 2218, 2223, 167 L.Ed.2d 1014 (2007) ("[W]hen there is ambiguity in the prospective juror's statements," the trial court is "entitled to resolve it in favor of the State.").

Mr. Landry gave answers that were both distinctly pro-life and answers in which he seemed to indicate that he could consider death if he "could see" that the defendant did commit murder. In addition to these disparate opinions, Mr. Landry did not respond to death penalty question numbers 93 through 103 on his questionnaire, checking answers only to death penalty question number 104 (with its 8 subparts). The totality of Mr. Landry's responses left the district attorney with questions as to Mr. Landry's position on the death penalty and whether he could actually vote to impose it. Given that uncertainty, the decision of the district attorney to excuse Mr. Landry peremptorily does not appear to be founded on race, and no discriminatory intent appears to have tainted the State's peremptory strike of Mr. Landry.

The State's peremptory challenge of prospective juror Ms. McWashington was based on her friendship with Officer Richard McGee, who was named by the defendant to a jailhouse confidant as having been involved with his wife, contributing to the family breakdown that lead to the events at issue in this case. However, the defendant argues on appeal that it was known by the time that Ms. McWashington was peremptorily challenged (after acknowledging that Officer McGee was a family friend and the pastor of her church) "that Officer McGee was not going to be called as a witness in

the case by either side," though it was not a fact established in the record. Consequently, the defendant asserts that the State's reasons were pretextual, given that Ms. McWashington's answers otherwise favored the State (having expressed no aversion to the death penalty during voir, when she stated, "I really don't see a problem with the death penalty," and acknowledging that she could consider both life imprisonment and the death penalty). Thus, the defendant claims it was error for the trial court to deny his *Batson* challenge as to Ms. McWashington. Nevertheless, knowledge of, or a personal relationship with, a party or potential witness in a case is a sufficient race neutral explanation for challenge to prospective juror. *See State v. Qualls*, 40,630, pp. 20–21 (La.App. 2 Cir. 1/27/06), 921 So.2d 226, 240; *State v. Mamon*, 26,337, p. 18 (La.App. 2 Cir. 12/16/94), 648 So.2d 1347, 1359, *writ denied*, 95–0220, p. (La. 6/2/95), 654 So.2d 1104. Therefore, we conclude that the State's peremptory challenge of Ms. McWashington bears no indicia of racial animus, and the trial court properly denied the *Batson* claim as to her.

The Supreme Court has acknowledged that, looking back on voir dire from the appellate level, "[t]he rub has been the practical difficulty of ferreting out discrimination in selections discretionary by nature, and choices subject to myriad legitimate influences, whatever the race of the individuals on the panel from which jurors are selected." *Miller–El v. Dretke*, 545 U.S. at 238, 125 S.Ct. at 2324. Given the broad discretion *Batson* accords the trial judge in ruling on the fact-bound question of whether race was significant in determining who was challenged and who was not, an appellate court should not substitute its evaluation of the record for that of the trial court. *See Hernandez v. New York*, 500 U.S. at 364, 111 S.Ct. at 1868 ("[T]the trial court's

decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal."); *Batson*, 476 U.S. at 98 n.21, 106 S.Ct. at 1724 n.21 ("Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.").

In the instant case, the defendant has not borne his burden under *Batson*. At a point when three African–Americans had been struck peremptorily from the twelve-person jury, the judge acquiesced in the suggestion that the State should articulate reasons; however, it should be noted that, of the two African–American females in that number, one was strongly opposed to the death penalty (Ms. Curry), and the other was struck simultaneously by the State and the defense (Ms. Venus), and thus, was not part of the *Batson* equation, pursuant to LSA–C.Cr.P. art. 795(D). Additionally, the parties expressed uncertainty as to the race of the third juror struck (Mr. Landry).

Neither the numbers nor the facts support a prima facie showing that the State based its peremptory challenges on race. The trial judge's findings that no discriminatory purpose tainted the State's peremptory strikes is borne out by the record, and no abuse of discretion is apparent. Under the circumstances, the defendant's *Batson* claims fail on the merits and warrants no relief by this court.[43]

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[43] We note that the defendant's *Batson* claim was revisited in connection with the defendant's motion for new trial. At a January 23, 2012 hearing the defense filed into evidence statistical data from the judicial district "from January 2007 to July 2011," arguing that this data demonstrated a longstanding pattern of disproportionate numbers of African–Americans being struck by the

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Bossier Parish District Attorney's Office, at a rate of "almost two and a half times the rate that they reject white jurors" in the parish. However, this court instructed against relying solely on such statistical data to establish a prima facie case of discrimination in *State v. Dorsey*, 10–0216 (La. 9/7/11), 74 So.3d 603, and in *State v. Duncan*, 99–2615 (La. 10/16/01), 802 So.2d 533. In *State v. Duncan* this court rejected an exclusively numerical formula in establishing a prima facie case under *Batson*, stating, "[T]here is not a per se rule that a certain number or percentage of the challenged jurors must be black in order for the court to conclude a prima facie case has been made out ... Such number games, stemming from the reference in *Batson* to a 'pattern' of strikes, are inconsistent with the inherently fact-intense nature of determining whether the prima facie requirement has been satisfied. Indeed, such attempts to fashion absolute, per se rules are inconsistent with *Batson* [476 U.S. at 96–97, 106 S.Ct. 1712] in which the court instructed trial courts to consider 'all relevant circumstances.' " *State v. Duncan*, 99–2615 at pp. 21–22, 802 So.2d at 549–50. We concluded in *State v. Duncan* that "it is important that the defendant come forward with facts, not just numbers alone, when asking the district court to find a prima facie case." *Id.*, 99–2615 at p. 22, 802 So.2d at 550 (quoting *United States v. Moore*, 895 F.2d 484, 485 (8th Cir. 1990)). *See also Foster v. Chatman*, — U.S. ——, ——, 136 S.Ct. 1737, 1748, 195 L.Ed.2d 1 (2016) ("[A]ll of the circumstances that bear upon the issue of racial animosity must be consulted."). We conclude that the trial court did not abuse its discretion in denying the defendant's motion for new trial on Batson grounds. No prejudicial error was demonstrated under LSA–C.Cr.P. art. 851(B)(2) or (4), which would warrant granting a new trial, and none of the "new material" presented in the motion for new trial persuades that the trial court erred in denying the motion for new trial on Batson grounds. (We note that the instant case is clearly distinguishable from *Foster v. Chatman*, which held that the strikes of two African–American prospective jurors violated the defendant's constitutional rights under *Batson*, based on a finding that certain of the prosecutor's race neutral reasons were expressly contradicted by other evidence and that there was a "persistent focus on race in the prosecution's file.")

In his eleventh assignment of error, the defendant avers that the trial court erred by failing to instruct the jury as to any lesser-included offense, which did not require specific intent to kill or inflict great bodily harm, i.e., felony murder, particularly when the sole defense offered by trial counsel was that the defendant's diminished mental capacity precluded him from formulating the requisite specific intent to kill or inflict great bodily harm. The defendant also complains, on appeal, that the trial court failed to charge the jury as to its authority to return a lesser verdict, even if convinced of guilt of first degree murder.[44] The defendant argues that failure to so instruct the jury constituted a violation of due process, in violation of the rule announced in *Beck v. Alabama*, 447 U.S. 625, 636, 100 S.Ct. 2382, 2389, 65 L.Ed.2d 392 (1980): "[A] defendant is entitled to a lesser included offense instruction where the evidence warrants it."

As an initial matter, the defendant concedes that trial counsel neither requested any such jury instruction, nor objected to the instructions as given. In fact, when queried by the trial court as to whether he was "satisfied with the jury charges," Mr. English responded, "I'm satisfied with them, Your Honor." Accordingly, the claim raised here was not preserved for appellate review. LSA–C.Cr.P. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was

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[44] The jury instructions, as given, demonstrate that this portion of the defendant's claim is meritless, as the trial judge plainly instructed the jury, "If you are not convinced that the defendant is guilty of the offense charged, you may find the defendant guilty of a ... responsive lesser offense ...." The trial court's jury instructions further included detailed instructions regarding the "two possible ... responsive lesser offenses" in this case, second degree murder and manslaughter.

objected to at the time of occurrence .... It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor."); *State v. Draughn*, 05–1825 at p. 56, 950 So.2d at 621 ("The failure of the defense to contemporaneously object ... waives our review of the issue on appeal."). Although the defendant contends that this is a fundamental structural error that should be reviewed by this court, we conclude that the jury instructions as given in this case do not demonstrate error.

Louisiana Code of Criminal Procedure Article 802 requires the trial court to charge the jury as to the law applicable to the case. As a general matter, a trial judge has the duty to instruct jurors as to "every phase of the case supported by the evidence whether or not accepted by him as true," and that duty extends to "any theory of defense which a jury could reasonably infer from the evidence." *State v. Marse*, 365 So.2d 1319, 1323 (La. 1979). *See also State v. Henry*, 449 So.2d 486, 489 (La. 1984) (" '[D]ue process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence.' ") (quoting *Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049, 2053, 72 L.Ed.2d 367 (1982)).

In the present case, the State charged the defendant in a single indictment with three counts of first degree murder, committed when the offender had the specific intent to kill or inflict great bodily harm upon more than one person, pursuant to LSA–R.S. 14:30(A)(3). The legislatively approved responsive

verdicts for first degree murder are set out in LSA–C.Cr.P. art. 814(A)(1), which states:

> The only responsive verdicts which may be rendered when the indictment charges the following offenses are:
>
> 1. First Degree Murder:
>
> Guilty.
>
> Guilty of second degree murder.
>
> Guilty of manslaughter.
>
> Not guilty.

The guilt phase verdict forms for each of the three counts in this case comported with LSA–C.Cr.P. art. 814(A)(1), stating, in pertinent part:

> 1. We, the jury, find the defendant guilty.
>
> 2. We, the jury, find the defendant guilty of Second Degree Murder.
>
> 3. We, the jury, find the defendant guilty of Manslaughter.
>
> 4. We, the jury, find the defendant not guilty.

Further, as set forth hereinabove, the trial judge's instructions to the jury also comported with *Beck v. Alabama*, in that the jury was not given an all-or-nothing option between capital punishment or innocence, as the jury was also instructed as to, and given the option of returning, the lesser included verdicts of second degree murder or manslaughter.

Notably, the guilt phase of the defendant's capital trial was virtually devoid of evidence that the May 5, 2008 triple homicide unfolded as a felony murder, i.e., during the perpetration of an aggravated burglary,

given that the defendant was the son-in-law of two of the victims and step-father of the third victim, although he was clearly not a welcome guest, as evidenced in Christine Colston Young's 911 call upon his arrival at her home. There was no sign of forced entry upon the first responders' arrival at 19 Grace Lane, as attested to by Sergeant Alvin Eagle, Jr., who testified that the front door was slightly ajar—"two to three inches opened." Under these circumstances, even had trial counsel requested a jury instruction on felony murder, a lesser offense excluding the element of specific intent, such an instruction would not have been properly admitted under *Hopper v. Evans* because the elements of such crime were not "fairly supported by the evidence." Nevertheless, the absence of a jury instruction on felony murder did not preclude the defendant from testifying that he had no intent to kill his family, nor Mr. English from urging to the jury repeatedly in his guilt phase closing argument that his client had no intent to kill because "Robert McCoy is so defective emotionally. He is so defective mentally .... Robert McCoy doesn't have the mental capacity to form a specific intent." The instructions provided by the trial judge closely follow those provided in Section 7.03 of the Louisiana Judges' Criminal Bench Book. Accordingly, this assignment of error lacks merit.

Admission of Other Crimes Evidence

In his twelfth assignment of error, the defendant contends the trial court erred in allowing the admission of evidence of other unadjudicated violent crimes allegedly committed by the defendant, during the penalty phase of the trial, without prior notice by the State or the holding of an advance hearing outside the presence of the jury, in violation of *State v. Jackson*, 608 So.2d

949 (La. 1992). The defendant contends that the result was an unfair sentencing hearing, and the defendant's death sentence be vacated and a new penalty phase ordered.

Louisiana Code of Criminal Procedure Article 905.2(A) provides that "[t]he sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the victim, and the impact that the crime has had on the victim, family members, friends, and associates." Rules governing the admission in penalty phase hearings of unrelated and unadjudicated crimes evidence to prove the defendant's character and propensities have evolved jurisprudentially.

In *State v. Brooks*, 541 So.2d 801, 814 (La. 1989), this court approved the State's introduction in its penalty phase case-in-chief of unrelated and unadjudicated crimes, once the trial court determines that: (1) the evidence of the defendant's connection with the commission of the unrelated criminal conduct is clear and convincing; (2) the proffered evidence is otherwise competent and reliable; and (3) the unrelated crimes have relevance and substantial probative value as to the defendant's character and propensities, which is the focus of the sentencing hearing under LSA–C.Cr.P. art. 905.2.

In *State v. Jackson*, 608 So.2d 949, 955 (La. 1992), this court reaffirmed the holding announced in State v. Brooks, but deemed it necessary to place a limitation on this type of evidence in order to ensure that due process is not violated by the injection of arbitrary factors into the jury's deliberations and to prevent a confusing or unmanageable series of mini-trials of unrelated and unadjudicated conduct during the sentencing hearing.

In Jackson, this court ruled that, to be admissible in a penalty phase hearing, the evidence of the unadjudicated criminal conduct must involve violence against the person of the victim, for which the period of limitation for instituting prosecution had not run at the time of the indictment of the accused for capital murder. *State v. Jackson*, 608 So.2d at 955–56.

In *State v. Bourque*, 622 So.2d 198, 248 (La. 1993), cert. denied, 523 U.S. 1073, 118 S.Ct. 1514, 140 L.Ed.2d 667 (1998), this court held that evidence of an unrelated, unadjudicated killing, committed one hour before the murder at issue in the capital case being tried, was admissible, since it was relevant evidence of the defendant's character and propensities and fell within the *State v. Brooks* and *State v. Jackson* limitations. However, in *State v. Bourque*, the defendant's death sentence was reversed because the prosecutor had conducted a "prohibited mini-trial" on the issue of the defendant's guilt or innocence in the unadjudicated killing. *State v. Bourque*, 622 So.2d at 248. In *Bourque*, of the twelve prosecution witnesses heard at the penalty phase, eleven testified about the unadjudicated killing, which this court held "impermissibly shift[ed] the focus of a capital sentencing jury from considering the character and propensities of the defendant to a determination of guilt or innocence of the unadjudicated criminal conduct." *Id.* Thus, this court limited the amount of admissible evidence of unadjudicated criminal conduct, which a prosecutor may introduce in its case-in-chief during the penalty phase to a "minimal" amount. *Id.*

However, this court retreated from that opinion and overruled *State v. Bourque* in *State v. Comeaux*, 93–2729, p. 10 (La. 7/1/97), 699 So.2d 16, 22, cert. denied, 522 U.S. 1150, 118 S.Ct. 1169, 140 L.Ed.2d 179 (1998), holding that Bourque's limitation on the amount of ad-

missible evidence, no matter how highly relevant to the defendant's character and propensities, was unnecessary to guarantee due process. In retreating from the Bourque holding, *State v. Comeaux* recognized that "[p]erhaps an overabundant amount of evidence of significant unadjudicated criminal conduct ... could reach a point where the jury's attention is improperly shifted, this court concluded that "whether otherwise admissible evidence of unrelated and unadjudicated criminal conduct (the admissibility of which has already been subjected by this court to significant limitations) injects an arbitrary factor into a capital sentencing hearing is one to be decided on a case-by-case basis." *State v. Comeaux*, 93–2729 at pp. 10–11, 699 So.2d at 22. The Comeaux court held that a trial judge "should cautiously consider the quantum of evidence necessary to convey the message to the jury that the defendant has engaged in other serious criminal conduct that the jury should consider in its determination of sentence, without shifting the jury's focus from its function of determining the appropriate sentence in the capital case to a focus on the defendant's involvement in other unrelated criminal conduct." *Id.*, 93–2729 at pp. 11–12, 699 So.2d at 23.

In the instant case, for context we note that, on March 12, 2010 (over a year before defendant's capital trial commenced), the State filed pretrial notice of its intent to use evidence of other crimes pursuant to LSA–C.Cr.P. art. 720 and LSA–C.E. art. 404(B) "at the defendant's trial," leaving open the possibility that the evidence would be admitted in either the guilt phase or the penalty phase. The State's notice described the other crimes evidence it sought to introduce as: "All evidence from the criminal investigation of the incident

that occurred on or about the 2nd day of April, 2008 concerning Yolanda Colston."

On November 16, 2010 the trial court held a pretrial hearing on the matter, and after considering the parties' arguments, the court ruled that the State's other crimes evidence was res gestae and thereby admissible. The defendant's trial counsel noticed his intent to seek writs on the issue, and thereafter, the Second Circuit denied review of the trial court's ruling permitting the state to introduce evidence of prior other crimes evidence under LSA–C.E. art. 404(B). *See State v. McCoy*, 46,266 (La. App. 2 Cir. 1/6/11) (unpublished). Contrary to appellate counsel's assertion in brief, the trial court did not limit its ruling to the guilt phase.

During the penalty phase, the State called Yolanda Colston as its first witness, and she was introduced as the mother of victim Gregory Lee Colston. Yolanda was also the daughter of victim Christine Colston Young, and the stepdaughter of victim Willie Ray Young. Yolanda testified that by the Spring of 2008, her relationship with the defendant had "gotten bad" and the two had separated, with Yolanda and her children leaving the marital residence. Yolanda described the event that led to the warrant being issued for that defendant's arrest, which was outstanding at the time of the triple homicide, telling the jury that the defendant had broken into her house through a sliding door and was hiding inside, lying in wait, when she and her two-year-old daughter returned home. Yolanda said that the defendant came out of hiding with a knife and took her to the back room with the knife pressed against her throat; he held her down on a bed and threatened to kill her and then kill himself—all in the presence of their eighteen-month-old daughter. Yolan-

da testified that she pleaded with the defendant, "Please do not to do this."

At that point, the defense objected, arguing (outside the presence of the jury) against the evidence "that should have been put on at the guilt phase" coming in at the penalty phase. The defense asserted that the State "cannot go into details of prior criminal acts ... it is not permissible under the laws of Louisiana." The district attorney reminded the court that it filed its notice of intent to introduce other crimes evidence "a long time ago," and it was ruled admissible to show "what motivation [the defendant] had for being there and why the police were looking for him and why he was named as a suspect immediately after discovery of the bodies .... [S]he is allowed under the law to tell the jury what happened between her and the defendant and how it's affected her life. That's what this ... penalty phase is about." The defense disagreed, seeking to limit the evidence to the fact that a warrant issued against the defendant for aggravated battery against Ms. Colston and to limit the testimony to exclude any "graphic detail" about the actual battery. The defense moved that Ms. Colston's testimony be struck for going "into the specific details."

The trial court overruled the defense objection relying on *State v. Comeaux*, which he quoted as holding: "Evidence that established the defendant in the recent past has engaged in criminal conduct involving violence to the person is highly probative of the defendant's character and propensities." The defense then moved for a mistrial on grounds that the evidence should not be admitted because they are "mere allegations," which the defendant had never been tried on. The trial court reiterated his reliance on *State v. Comeaux* and denied the mistrial.

The defendant contends on appeal that it was clear error for the trial court to deny a mistrial when the State elicited inadmissible evidence of other, unadjudicated criminal conduct. The defendant further asserts that, based on the admission of this inadmissible evidence, his sentence should be vacated.

Pursuant to LSA–C.Cr.P. art. 775, upon motion of a defendant, a mistrial shall be ordered when prejudicial conduct in or outside the courtroom makes it impossible for the defendant to obtain a fair trial or when authorized by LSA–C.Cr.P. art. 770 (listing as a basis for mistrial, among others, reference to "[a]nother crime committed or alleged to have been committed by the defendant as to which evidence is not admissible") or LSA–C.Cr.P. art. 771 (regarding inappropriate remarks or comments). A trial judge has broad discretion in determining whether conduct is so prejudicial as to deprive an accused of a fair trial. *State v. Sanders*, 93–0001, p. 21 (La. 11/30/94), 648 So.2d 1272, 1288, cert. denied, 517 U.S. 1246, 116 S.Ct. 2504, 135 L.Ed.2d 194 (1996); *State v. Wingo*, 457 So.2d 1159, 1166 (La. 1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2049, 85 L.Ed.2d 322 (1985). Mistrial is a drastic remedy and is warranted under LSA–C.Cr.P. art. 770 only when a remark or comment referencing an accused's commission of other crimes results in prejudice to his substantial rights sufficient to undermine the fairness of trial. *State v. Broaden*, 99–2124, p. 16 n.5 (La. 2/21/01), 780 So.2d 349, 360 n.5.

In the present case, when Yolanda Colston's testimony resumed, the district attorney asked no more questions about the previous aggravated battery, and the remainder of her testimony was in the form of a victim impact statement. Yolanda's testimony regarding the previous incident in which defendant threat-

ened her life consumed less than two pages of transcript, and thus did not constitute a "prohibited mini-trial" or inappropriately shift the jury's focus. Yolanda's recollection of the prior aggravated battery event was concise and did not recount graphic details. The evidence of the defendant's unadjudicated aggravated battery against Yolanda Colston was timely,[45] competent, clear and convincing, and highly probative of the defendant's character and propensity for violence, and thus, had direct bearing on the penalty phase of his bifurcated trial without injecting an arbitrary factor. No *State v. Jackson* violation is apparent under these facts, and this assignment of error fails on the merits.

Victim Impact Testimony

In the defendant's thirteenth assignment of error, he contends that the State exceeded the scope of appropriate victim-impact evidence, beyond that authorized under *State v. Bernard*, 608 So.2d 966 (La. 1992), during the testimony of Kent Falting, teacher and basketball coach of the youngest victim, Gregory Colston,

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[45] As applied to the instant case, the defendant committed an aggravated battery against Yolanda Colston in April 2008. The punishment for aggravated battery is imprisonment, with or without hard labor, for not more than ten years, pursuant LSA–R.S. 14:34(B). Under LSA–C.Cr.P. art. 572(A)(2), the State had four years, or until April 2012 to institute prosecution against the defendant for aggravated battery, as an offense not necessarily punishable by imprisonment at hard labor. Accordingly, on May 29, 2008, the date the defendant was indicted for triple homicide, the *State v. Jackson* timeliness window ("to that conduct for which the period of limitation for instituting prosecution had not run at the time of the indictment of the accused for the first degree murder for which he is being tried") for introducing evidence of the April 2008 aggravated battery was still open. *See State v. Jackson*, 608 So.2d at 955.

and thereafter, State Exhibit Number 101 ("S–101"), written by Coach Falting, was sent into the jury's deliberation room, allegedly in violation of LSA–C.Cr.P. art. 793. As discussed below, neither complaint warrants this court's intervention.

Louisiana Code of Criminal Procedure Article 905.2(A) provides, in pertinent part: "The sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the victim, and the impact that the crime has had on the victim, family members, friends, and associates."[46] Thus, the State was entitled to introduce evidence at the penalty phase that provided the jury with "a quick glimpse" of Gregory Colston's short life of seventeen years and the impact his loss of life had on his family members, friends, and associates. *See Payne v. Tennessee*, 501 U.S. 808, 830, 111 S.Ct. 2597, 2611, 115 L.Ed.2d 720 (1991) ("A State may decide also that the jury should see 'a quick glimpse of the life petitioner chose to extinguish,' ... to remind the jury that the person whose life was taken was a unique human being.") (quoting *Mills v. Maryland*, 486 U.S. 367, 397, 108 S.Ct. 1860, 1876, 100 L.Ed.2d 384 (1988)).

State v. Bernard allowed the State to "introduce a limited amount of general evidence providing identity to the victim and a limited amount of general evidence demonstrating harm to the victim's survivors." Bernard, 608 So.2d at 971. In providing guidance for the proper introduction of victim impact evidence, the court instructed that the State may present evidence

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[46] Article 905.2 was amended in 1999 (via 1999 La. Acts, No. 783, § 3 (effective January 1, 2000)) to expand who may testify as "victim impact" witnesses—from merely family members—to also allow testimony from a victim's "friends and associates."

reasonably showing that the defendant "knew or should have known that the victim, like himself, was a unique person and that the victim had or probably had survivors ...." *Id.*, 608 So.2d at 972. However, the Bernard court cautioned that "the more detailed the evidence relating to the character of the victim or the harm to the survivors, the less relevant is such evidence." *Id.*, 608 So.2d at 971. Also forbidden are "detailed descriptions of the good qualities of the victim or particularized narrations of the emotional, psychological and economic sufferings of the victim's survivors." *Id.*, 608 So.2d at 972.

Under LSA–C.Cr.P. art. 905.2(A) and *State v. Bernard*, Coach Falting qualified as an appropriate victim impact witness for seventeen-year-old Gregory Colston. Coach Falting, whose testimony consumed only five pages of the sentencing hearing transcript, told the jury that Gregory, a high school senior at the time of his murder, had earned a "preferred walk-on spot" at Northwestern State University in Natchitoches for the upcoming year. Coach Falting taught Gregory geometry his sophomore year, and he earned the highest grade in the class that year, a 98% "A." Coach Falting also recalled that Gregory volunteered to tutor other athletes, and he was "extremely loyal to his teammates and friends and was more than willing to help them out ... getting them on the right track for the class."

Through Coach Falting, the State admitted its only exhibit at the penalty phase, S–101, a newspaper article written by Coach Falting about Gregory entitled, "The World Has Lost a Dreamer," which had been published in the local newspaper after the triple homicide. During Coach Falting's testimony, the defense objected to the newspaper article being admitted into evidence on grounds that it was "written" and because "newspaper

articles are not allowed into evidence," an assertion that the district attorney promptly took odds with; and the trial court overruled the objection and received the evidence.

According to the defendant, on appeal, the newspaper article was not immediately published to the jury. However, during the State's closing argument, the district attorney told the jury:

> I had Coach Falting testify earlier today and he brought me the article that he wrote and it's offered into evidence. This is State's Exhibit 101. And I'm not going to read it because I can't, but I invite you to. And you can—you can take that back into the jury room.

Notably, the defense voiced no objection during the State's argument. Shortly after retiring to deliberate, the foreperson sent a note to the trial court stating that the jury wished to inspect S–101, the newspaper article written by the coach. When asked if he had any objection to the trial court delivering that writing to the jurors, Mr. English responded, "No, Your Honor." Thereafter, extra copies of S–101 were delivered to the deliberation room to facilitate the jurors' inspection.

The defendant complains, on appeal, that S–101 was "entirely inadmissible" as hearsay and as a written document, which should not have been sent into the jury room under LSA–C.Cr.P. art. 793. The defendant's broader argument is that the combination of Coach Falting's testimony, his newspaper article admitted as S–101, and the fact that the jurors read the article in the jury room "exceeded the narrow limit of permissible victim impact" evidence in violation of *State v. Bernard.*

Nevertheless, the alleged error of sending the article into the jury room was not preserved for appellate review in the absence of a contemporaneous objection. LSA–C.Cr.P. art. 841; *State v. Draughn*, 05–1825 at p. 56, 950 So.2d at 621 ("The failure of the defense to contemporaneously object ... waives our review of the issue on appeal."). In any event, as discussed below, the error, if any, was harmless. *See State v. Frost*, 97–1771 at p. 14, 727 So.2d at 430 ("The adducement of victim impact evidence which exceeds the scope of Bernard is reviewed under a harmless error standard.").

Louisiana Code of Criminal Procedure Article 793(A) provides, in pertinent part:

> [A] juror must rely upon his memory in reaching a verdict. He shall not be permitted to refer to notes or to have access to any written evidence .... Upon the request of a juror and in the discretion of the court, the jury may take with it or have sent to it any object or document received in evidence when a physical examination thereof is required to enable the jury to arrive at a verdict.

See State v. Johnson, 541 So.2d 818, 824 (La. 1989) (holding it was error to allow the jury to view autopsy and crime lab reports when they would assist the jury only if examined for content); *State v. Perkins*, 423 So.2d 1103, 1109–10 (La. 1982) (holding that the jury should not inspect written documents for the contents during deliberation). In *State v. Johnson*, this court recognized that Louisiana follows a minority view regarding written evidence in the deliberation room:

> The rationale for the rule expressed by Art. 793 appears to be the concern that if jurors are allowed to review the contents of written ex-

> hibits during their deliberations, they will place undue weight on such exhibits and not decide the case with an even balance concerning all of the evidence, and their own recall thereof. "[T]he Louisiana legislature has made the value-determination that, because of the presumed prejudice, documents received in evidence should be sent to the jury on its request only 'when a physical examination thereof is required to enable the jury to arrive at a verdict.'" *State v. Freetime*, 303 So.2d 487, 489 (La. 1974) (emphasis in opinion).

As we have noted in the past, *Freetime*, 303 So.2d at 489, most other jurisdictions allow jurors to take documents or papers, with the exception of depositions, into the jury room. *See* 4 Wharton's Criminal Procedure 555 (Torcia 1976); Annt., 37 A.L.R.3d 238. But the Legislature has not seen fit to change our state's rule, the violation of which has usually resulted in the reversal of the defendant's conviction. *See, e.g., Perkins*, supra (trial judge committed reversible error by allowing jury to view a copy of defendant's statement in the jury room); *Freetime*, supra (conviction reversed where trial judge allowed jury to review defendant's confession during deliberations). *See also State v. Passman*, 345 So.2d 874 (La. 1977) (trial judge correctly refused jury's request to examine police radio log).

Johnson, 541 So.2d at 824. In reversing the *Johnson* defendant's first degree murder conviction and death sentence on other grounds, the court instructed that "it is unnecessary for us to determine whether the violation of Art. 793, standing alone, warrants reversing defendant's convictions." *Id.*, 541 So.2d at 825. Nevertheless, the court added that on retrial, "the jury

should not be allowed to examine the verbal contents of written exhibits during deliberations." *Id.*

In *State v. Adams*, 550 So.2d 595, 599 (La. 1989), this court stated that the "trial judge has no discretion to make exceptions" to the statutory prohibitions of LSA–C.Cr.P. art. 793. However, the *Adams* court recognized that the State and defense may agree to waive the statutory provisions of LSA–C.Cr.P. art. 793, but the agreement must be in clear express language and must be reflected in the record. *State v. Adams*, 550 So.2d at 599.

More recently, in *State v. Baham*, 13–0058 (La.App. 4 Cir. 10/1/14), 151 So.3d 698, *writ denied*, 14–2176 (La. 9/18/15), 178 So.3d 138, 139, during prosecution of a second degree murder the jury requested during deliberations to see the statement of an eyewitness who had testified at trial. Over defense objection, the trial judge sent the jury the transcript of the witness's statement, reasoning that, under LSA–C.Cr.P. art. 793(A), it would have been permissible to replay the audio of the witness's statement, properly admitted as impeachment evidence, to the jury but that it was easier to allow them to read the statement rather than to deal with the technical difficulties of audio player. *State v. Baham*, 13–0058 at p. 10, 151 So.3d at 704.

The Fourth Circuit found that the trial court erred in permitting the jury to review the transcribed statement, but opined that "such errors may not necessitate reversal." *Id.*, 13–0058 at p. 11, 151 So.3d at 705. The Fourth Circuit deemed the error a "trial error," which can be quantitatively assessed in the context of other evidence and therefore is subject to harmless error analysis, as opposed to a "structural error," which defies analysis under the harmless error doctrine. *Id.*, 13–0058 at p.

12, 151 So.3d at 705. Accordingly, the Fourth Circuit opined that "although Art. 793's prohibition is explicit, violation of that article does not mandate reversal." *Id.* Thus, when viewed in relation to the "substantial" and "extensive" evidence of the *Baham* defendant's guilt (the crime was captured from numerous video-surveillance camera angles), the Fourth Circuit found the error of the jury's access to a witness's statement during deliberation was harmless, as it did not contribute to the verdict, and affirmed the conviction. *Id.*, 13–0058 at pp. 12–13, 151 So.3d at 705–06.

In the instant case, even if trial counsel's objection during Coach Falting's testimony, based on the article as a "written" piece of evidence, preserved the issue on appeal, despite trial counsel having expressed no objection when the newspaper article was sent to the jury,[47] it is nevertheless significant that the newspaper article was admitted during the penalty phase. The article was a tribute piece, written in memory of the defendant's youngest victim, Gregory Colston and, although it was written victim-impact evidence, its

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[47] The contemporaneous objection rule, contained in LSA–C.Cr.P. art. 841(A) ("An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence.") and LSA–C.E. art. 103 ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and ... [w]hen the ruling is one admitting evidence, a timely objection or motion to admonish the jury to limit or disregard appears of record, stating the specific ground of objection ...."), does not frustrate the goal of efficiency; instead, it is specifically designed to promote judicial efficiency by preventing a defendant from gambling for a favorable verdict and then, upon conviction, resorting to appeal on errors that either could have been avoided or corrected at the time or should have put an immediate halt to the proceedings. *State v. Taylor*, 93–2201, p. 7 (La. 2/28/96), 669 So.2d 364, 368.

purpose was to paint a picture of who Gregory had been to Coach Falting.[48] Given that the focus of the penalty phase is "the character and propensities of the offender, and the victim, and the impact that the crime has had on the victim, family members, friends, and associates," pursuant to LSA–C.Cr.P. art. 905.2, the newspaper article was probative evidence relevant to the defendant's sentencing hearing.

We conclude that any error of the trial court, under LSA–C.Cr.P. art. 793, in providing written copies of the newspaper article to the jury to read during deliberations was a trial error, subject to harmless error analysis. Under the specific facts of this case, wherein the defendant shot three family members in the head at close range, the jury's decision to return a sentence of death on all three counts seems wholly unattributable to the trial court's decision to provide copies of the written article, S–101, to the jury during their penalty phase deliberations. *See* LSA–C.Cr.P. art. 921 ("A judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or

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[48] We note that the largest portion of the less than one-page newspaper article by Coach Falting consisted of the title "The World Has Lost a Dreamer" in large lettering and a photograph of the victim Gregory Colston, thus, it seems likely that the newspaper article was requested at least as much for the photograph as for the written content. *See State v. Davis*, 92–1623, p. 23 (La. 5/23/94), 637 So.2d 1012, 1025 (a "[p]hotograph is not 'written' evidence of 'testimony' within the meaning of art. 793."). *See also State v. Overton*, 337 So.2d 1058, 1065 (La. 1976) ("As [Article 793] reads, the matter is one to be decided 'in the discretion of the court.' In this situation, where the jury had not yet viewed the photographs in evidence, it was more orderly to permit the photographs to be sent to the jury room than to conduct [a] ... proceeding for this purpose in open court after oral arguments .... There is no abuse of discretion in this ruling.").

variance which does not affect substantial rights of the accused."); *State v. Johnson*, 94–1379, p. 14 (La. 11/27/95), 664 So.2d 94, 100 ("The Sullivan inquiry 'is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.' ") (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993)).

Coach Falting's victim-impact statements were neither overly emotional nor overly descriptive of the victim. Nor did his newspaper article provide more than "a quick glimpse" of Gregory Colston. Further, the trial judge instructed the jury on the weight to be given to the victim impact testimony. Under these circumstances, even assuming that the trial court technically erred in permitting the written article to be read by the jurors in the deliberation room, that error appears harmless beyond a reasonable doubt. None of the victim impact testimony interjected an arbitrary factor into the proceedings so as to undermine confidence in the sentencing verdict returned by the jury. We find no merit in this assignment of error.

Presence of the Defendant a Trial

In his fourteenth assignment of error, the defendant argues that he was prejudiced by being forced to remain in the courtroom during his trial after he requested to be allowed to excuse himself from the proceedings.

With respect to a jury trial, LSA–C.Cr.P. art. 831(A) provides generally that a defendant shall be present at all proceedings "when the court is determining and ruling on the admissibility of evidence," "at all

proceedings when the jury is present," and "[a]t the rendition of the verdict or judgment, unless he voluntarily absents himself." However, this court has recognized that the provisions of LSA–C.Cr.P. art. 831 are not absolute and may be tempered by exigent circumstances arising at trial. *See State v. Broaden*, 99–2124, pp. 14–15 (La. 2/21/01), 780 So.2d 349, 360 ("[T]he provisions of Article 831 are not absolute .... [A]n accused may waive his presence by voluntary absence, [LSA–C.Cr.P.] art. 832,[49] or by not objecting to his absence from an Article 831A(3) hearing ....").

A defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom; a trial judge "must be given sufficient discretion" to deal with a disruptive defendant. *Illinois v.*

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[49] Article 832 provides, in pertinent part:

> A defendant initially present for the commencement of trial shall not prevent the further progress of the trial, including the return of the verdict, and shall be considered to have waived his right to be present if his counsel is present or if the right to counsel has been waived and:
>
> (1) He voluntarily absents himself after the trial has commenced, whether or not he has been informed by the court of his obligation to be present during the trial; or
>
> (2) After being warned by the court that disruptive conduct will cause him to be removed from the courtroom, he persists in conduct which justifies his exclusion from the courtroom.

Allen, 397 U.S. 337, 343–44, 90 S.Ct. 1057, 1060–61, 25 L.Ed.2d 353 (1970). Code of Criminal Procedure Article 832 was adopted to comply with the opinion in *Illinois v. Allen* and to clarify the trial court's right to exclude an unruly defendant. LSA–C.Cr.P. art. 832, 1997 Revision Comment (b). In tandem, LSA–C.Cr.P. art. 17 vests in the trial court "all powers necessary for the exercise of its jurisdiction and the enforcement of its lawful orders .... It has the duty to require that criminal proceedings shall be conducted with dignity and in an orderly and expeditious manner and to so control the proceedings that justice is done."

In this case, the defendant seemingly orchestrated outbursts for effect during his capital trial, exemplifying the type of defendant for whom LSA–C.Cr.P. art. 832(A)(2) was enacted. The defendant's disruptive behavior began with the State's opening statement, on August 4, 2011, when he turned around in his seat and appeared to be talking to a member of the audience; whereupon, the trial judge excused the jury, and gave the defendant his first warning:

> I'm making this warning. Mr. McCoy, if you do that again, then I will warn you one more time. After that, I will remove you from this courtroom to a place where you can hear the evidence in this proceeding, but you will not disrupt this courtroom. You are to pay attention. You're not to talk to anyone behind you ....
>
> * * *
>
> ... Mr. McCoy, we are in trial proceedings at this time. Any other outbursts—I will warn you again ... I have no problem in removing you from this courtroom .... You will be in a spot where you can hear the proceedings so that you

> can hear the testimony, but you will not be a disruption to this courtroom, sir.

Afterwards, trial counsel gave his opening statement, in which he conceded the defendant was the cause of the victim's deaths and informed the jury that the defendant did not have specific intent to kill because he stated that "Mr. McCoy is crazy." At which point, the defendant exclaimed, "What?" and then, "Judge Cox, may I be excused?" Once again, the jury was excused, and the trial judge further admonished the defendant:

> Mr. McCoy, this is your second warning .... If you make any other outbursts I will remove you from the courtroom to a conference room where you can hear the proceedings, sir ....

The defendant again asked if he could be removed, and the trial judge at first stated that the defendant could be removed to a conference room, but then ordered: "Deputy, he has to remain at the table, please."

The next outburst by the defendant came on August 5, 2011, as the penalty phase commenced, and the State called its first witness, the defendant's ex-wife, Yolanda Colston. Again, the defendant requested to be removed from the courtroom. The trial judge again denied the request, stating:

> I cannot do that under the law, Mr. McCoy, so I'm letting you know that ahead of time. I'm asking that you restrain yourself and stay in your chair, please, sir. And you are to be present according to the law.

Thereafter, during mitigation evidence presented by the defense, via the testimony of clinical psychologist Mark Vigen, Ph.D., the defendant began challeng-

ing the expert verbally by interjecting his own questions to the witness and, once again, the jury was excused. The trial judge reprimanded the defendant and directed him to "write those questions down and give them to your attorney to ask, but you are not to have an outburst in this courtroom again, sir." The jury was returned, only to be excused again a few minutes later following another outburst, after which the judge removed the defendant from the courtroom. Given that it was noon when the judge removed the defendant from the courtroom, Mr. English suggested that they break for lunch so that the jury would not have to be told that the defendant had been removed and so that "maybe Mr. McCoy will have calmed down by the time we get back and you can bring him back in." Upon returning from the lunch recess, the judge engaged in the following colloquy with the defendant before the jury came back into the courtroom:

> THE COURT: ... Mr. McCoy, sir, you have the right to write questions to your attorney .... I don't need any statements, please, Mr. McCoy. I'm just doing the best that I can with trying to keep everything even-keeled. I need you to sit in that chair and be quiet. And you can slide your questions to Mr. English. You can ask him to ask any questions of Dr. Vigen that you want him to ask .... But I cannot have those with you speaking out like that ... [Y]ou and I've talked.
>
> MR. McCOY: Yes, we have, Your Honor.
>
> THE COURT: ... I'm asking you to please not disrupt the courtroom. And I'm asking you that as a gentleman. Can you do that sir?

MR. McCOY: Yes, sir, I can, Your Honor. I give you my word as a gentleman. I won't interrupt anymore.

No further disruptions occurred on the record of the defendant's sentencing hearing.

The defendant now makes the argument on appeal that, under LSA–C.Cr.P. art. 832, he had a legal right to voluntarily absent himself from the proceedings and the trial court erred as a matter of law by denying him that right. The defendant claims that he was prejudiced by being forced to remain in the courtroom, citing trial counsel's concession of guilt and presentation of sentencing hearing testimony against the defendant's wishes. The defendant contends that his presence at the defense table "implicitly endorsed the existence of a lawyer-client relationship and gave Mr. English's representation a legitimacy it did not have." The defense further contends that the district attorney capitalized on the defendant's outbursts, when cross-examining the defense's mental health expert, Dr. Vigen, by questioning whether the defendant is someone who cannot not follow rules or laws and pointing to the defendant's disruption of the trial proceedings "three times this morning"; and thereafter arguing this point to the jury at the close of the penalty phase.

Recently, in *State v. Tucker*, 13–1631 at pp. 41–42, 181 So.3d at 621–22, this court faced a similar scenario when a capital defendant was removed from court at the request of defense counsel after the defendant became disruptive, then argued on appeal that counsel could not waive his presence at his capital trial. This court found that, "assuming the trial court erred in not first warning defendant under *Illinois v. Allen* or in not inquiring further into the validity of the waiver assert-

ed by defense counsel, a violation of defendant's right to be present at all stages of trial may constitute harmless error if a reviewing court determines beyond a reasonable doubt that the error did not influence the verdict." *State v. Tucker*, 13–1631 at p.42, 181 So.3d at 622. Accordingly, this court concluded that Tucker's absence from the final moments of the State's rebuttal argument was harmless. *Id.*

The present defendant's behavior does not rise to the level of disorder, disruption, and disrespect evinced in *Illinois v. Allen*, 397 U.S. at 339–40, 90 S.Ct. at 1059 (during his trial the defendant, "in a most abusive and disrespectful manner," argued with, and threatened, the judge and tore his attorney's file and threw papers on the floor) or in two leading Louisiana cases, *State v. Riles*, 355 So.2d 1312, 1313 (La. 1978) (during his trial the defendant argued with the judge, scuffled with the deputy sheriffs, and "otherwise disrupted the trial") or *State v. Lee*, 395 So.2d 700, 701–04 (La. 1981) (during his trial the defendant sang the Star Spangled Banner, "spoke in Elizabethan English of a rather Biblical style," recited scripture, and generally ranted). Nevertheless, the defendant's conduct appears to have been disruptive enough to warrant admonishment by the trial judge. Even though the defendant sought to voluntarily remove himself from the courtroom, the trial judge exercised the utmost restraint in responding to his disruptive behavior and, given that the jurors were judging the defendant in life or death matters, the trial court implicitly recognized that the jury had a right to observe the conduct and demeanor of the defendant during the trial as he faced the evidence of his crimes. Under the standard of review set forth in the above-cited jurisprudence, we find no abuse of discretion or due process violation apparent in the trial court's decision to deny the defend-

ant's request to be removed from the proceedings. This assignment is without merit.

Denial of "Second Motion for New Trial"

In his fifteenth assignment of error, the defendant contends that the trial court erred in dismissing his "Second Motion for New Trial," without reaching the merits, on the basis that it was untimely filed.

We reiterate that the evidence of the defendant's guilt was overwhelming. Nonetheless, the defendant persists in pursuing his alibi theory, and appellate counsel has expended considerable resources to investigate that defense,[50] which appears wholly baseless.

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[50] We note that a significant portion of the post-trial record in this case contains defense filings and hearing transcripts pertaining to appellate counsel's efforts to ascertain how and when the defendant's personal cell phone, which had been seized as evidence, had gone missing, post-verdict, an exercise which the district attorney aptly described as "go[ing] down rabbit trails wasting dollars and time." In addition, we also note that, during the course of the defendant's appeal, the defense's investigation into the defendant's alibi included an ex parte motion to view tangible objects in the possession of the BCPD, including a black "Mason" bag and its contents abandoned inside the defendant's white Kia, after the murders. Even though the defendant's cell phone had not been in the defendant's possession after May 5, 2008, since it was also abandoned inside the white Kia, the defense sought to have it forensically tested. On November 16, 2011, appellate counsel's associate, Ada Phelger, made an appointment to view and photograph the evidence according to police protocols and under police supervision. However, during that appointment, appellate counsel telephoned Ms. Phelger to meet him at Bossier Max for lunch. Whereupon, Ms. Phelger returned the evidence under inspection to the evidence bags and returned it to the police property room as per protocol. On November 30, 2011 Ms. Phelger returned to the Bossier City police department, unannounced, seeking to continue viewing the evidence that she had previously been viewing on November 16, 2011. The police were able to accommo-

In the defendant's second motion for new trial, he alleged there was newly discovered evidence relevant to his alibi.[51]

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date her, even though she had not made an appointment, and the police brought out the evidence boxes she had previously been viewing. At that time, however, the defendant's personal cell phone could not be found, and it has not subsequently been located. The trial court held at least three hearings related to the missing cell phone, and it was alluded at those hearings that the BCPD attribute the loss of the cell phone to Ms. Phelger; and appellate counsel went to great lengths to absolve his associate of any blame in the loss. This cell phone, which the defendant abandoned in the white Kia, though designated as Exhibit D–2, was not introduced as evidence at trial as it was deemed to have no evidentiary value. Appellate counsel justified the protracted post-verdict investigation because Mr. English did not investigate the defendant's alibi defense at the guilt phase.

[51] In the defendant's "Second Motion for New Trial," he asserted that "new and material evidence" shows: (1) The defendant left the Shreveport area near the end of April 2008 (after BCPD officers allegedly beat him and stole his car), when his brother, Carlos McCoy drove him to Dallas, Texas, where the defendant boarded a Greyhound Bus for Oakland, California, under the assumed name of "Ricki Ross" on April 18, 2008; (2) on May 2, 2008 the defendant flew from Oakland, California, to Houston, Texas, where he and a childhood friend, Robert Evans, stayed at a motel. While in Houston, the defendant spent time with two women he met there; (3) on May 4, 2008 Robert Evans, a professional truck driver, left Houston and returned to Shreveport to pick up a tractor trailer, which was bound for California, but, the defendant was afraid of returning to Bossier Parish because of his encounters with law enforcement, so Robert Evans agreed to take some of the defendant's "property" home for him to Bossier City; the defendant and Evans agreed to meet in Dallas on May 6, 2008, to head to California together; (4) the defendant rode from Houston to Dallas with Reena Miles, a friend of his brother, Carlos, and stayed in her home in Dallas; (5) as arranged, the defendant and Robert Evans met at a truck stop in Dallas, Texas, on May 6, 2008, and headed toward California. We note that LSA–C.Cr.P. art. 854, requires that, when the ground for the motion for new trial is newly discov-

The second motion for new trial has no demonstrable merit as it fails to show that on the date of the triple murder, May 5, 2008, the defendant was anywhere other than 19 Grace Lane in Bossier City, and the trial court did not abuse its discretion by denying the motion for new trial.

Under LSA–C.Cr.P. art. 853(B), a motion for new trial, founded on grounds of newly discovered evidence, may be filed within one year after the verdict. The jury in this case returned its unanimous verdict in the guilt phase on August 4, 2011, and returned its recommendation of the death sentence on August 5, 2011. The defendant timely filed his original motion for new trial on December 6, 2011, after twice seeking a continuance of the formal imposition of sentence in order to obtain

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ered evidence, the motion must show: "(1) That notwithstanding the exercise of reasonable diligence by the defendant, the new evidence was not discovered before or during the trial; (2) The names of the witnesses who will testify and a concise statement of the newly discovered evidence; (3) The facts which the witnesses or evidence will establish; and (4) That the witnesses or evidence are not beyond the process of the court, or are otherwise available." In the present case, although the allegedly new and material evidence, described in the defendant's second motion for new trial, would add certain details not contained in the defendant's trial testimony, all of the salient facts were testified to by the defendant at trial; thus, the new evidence is merely cumulative. Further, there is no statement in the second motion for new trial as to whether the listed new witnesses are within the process of the court or are otherwise available. In fact, rather than make the assurance of availability of these new witnesses, the second motion for new trial notes, "Undersigned counsel has begun the laborious task of investigating the evidence supporting Mr. McCoy's account, but the work is intensive given the geographic breadth of Mr. McCoy's journeys, his lack of knowledge of the full names of some of the persons with whom he travelled and associated, and the peripatetic lifestyle of many of these potential witnesses."

more time for preparation of the motion for new trial, pursuant to LSA–C.Cr.P. art. 853(A). The original motion for new trial urged seven arguments, all of which are re-urged in the defendant's appellate brief before this court. On January 20, 2012 the defendant filed a "Supplemental Motion for New Trial." The trial court held a contradictory hearing on the motion for new trial on January 23, 2012 and denied the defendant's motion for new trial.

Thereafter, the defendant's appellate counsel deposited his "Second Motion for New Trial" with the U.S. Postal Service ("USPS"), by certified mail, on Monday, August 6, 2012. Given that in 2012, August 4th and 5th fell on Saturday and Sunday, respectively, appellate counsel justified mailing his motion on Monday, as the first business day after the one-year anniversary of the verdicts.[52]

The second motion for new trial was physically received and filed in the district court on August 8, 2012.[53] The State responded, on September 14, 2012,

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[52] It is appellate counsel's position that depositing the second motion for new trial in USPS mail, on August 6, 2012, amounted to "timely filing on that date" and comports with the "mail box" rule of *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (the date a pro se inmate deposits his habeas corpus application in the prison mail system, as reflected by the metered postage and the stamp placed on the envelope by prison authorities, is considered the date of filing). However, that rule pertains to inmates only and attorneys are held to a stricter time limit under Louisiana Supreme Court Rule VII, § 9, and Rule X, § 5(d), infra.

[53] In reply to the State's opposition to the second motion for new trial, the defendant's appellate counsel attached exhibits showing a certified mail receipt for item number 7011 1150 0000 0130 8781 bearing a USPS cancellation stamp date of "Aug 6, 2012." Additionally, a USPS.com track and confirm notice for item

arguing that the second motion for new trial was untimely filed and that the defendant's conviction and sentence were "on appeal" on August 8, 2012. On October 1, 2012 the defendant's appellate counsel filed his reply to the State's opposition to the second motion for new trial. On October 9, 2012 the trial court filed its written judgment, which included reasons for ruling that the second motion for new trial was untimely filed on August 8, 2012. The trial court also spoke to the merits of the defendant's "new evidence," noting specifically that the defendant failed to specify his whereabouts on May 5, 2008, the day of the triple homicide in Bossier City, Louisiana, although he asserted additional details about his alleged whereabouts on May 4th and May 6th.

On November 8, 2012 appellate counsel filed his notice of intent to seek writs and also filed a motion to reconsider denial of the second motion for new trial. The district court denied the motion to reconsider on November 16, 2012. The Second Circuit denied the writ application, on January 17, 2013, with the following order:

WRIT DENIED.

The applicant, Robert McCoy, seeks review of the trial court's denial of his second motion for a new trial. Although this writ application is timely filed, on the showing made, this writ is hereby denied. *See* La. C.Cr.P. art. 853; La. C.Cr.P. art. 851(3); La. C.Cr.P. art. 858; *State v. Cavalier*, 96–3052 (La. 10/31/97), 701 So.2d 949.

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number 7011 1150 0000 0130 8781 reflects that the item was delivered on August 8, 2012 at 9:08 a.m.

State v. McCoy, 48,083 (La. App. 2 Cir. 1/17/13) (unpublished). Thereafter, the defendant sought supervisory review from this court, which was denied. *State v. McCoy*, 13–0400 (La. 4/5/13), 110 So.3d 1067.

On appeal, the defendant now argues that filing by mail is permissible and "the date the filing is tendered to the postal service for shipment is considered the filing date" under Rules of the Supreme Court of Louisiana, Rule VII, Section 9, and Rule X, Section 5(d). However, even were we to conclude that the cited appellate court rules apply to the filing of a motion for new trial in the district court, the defendant's second motion for new trial would nevertheless have been untimely under those rules. While the Louisiana Rules for Proceedings in District Courts are silent on the question of filing by mail, this court's Rules VII and X, as well as the Uniform Rules of Louisiana Courts of Appeal, Rule 2–13, direct that if a brief, writ, or other document due to be filed in an appellate court is received by mail on "the first legal day following the expiration of the delay," there shall be a rebuttable presumption that it was timely filed. Here, the defendant's second motion for new trial was received in the district court on August 8, 2012, which was the third legal day following the filing delay. Thus, the motion was untimely, and the trial court did not abuse its discretion by denying it as untimely.

Even if the defendant's second motion for new trial had been timely filed, the defense faced a formidable hurdle of showing that it exercised reasonable diligence yet failed to find the new evidence before trial. *See* LSA–C.Cr.P. art. 851(B)(3) (grounds for a new trial include "[n]ew and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during trial ... and ...

would probably have changed the verdict or judgment of guilty."). The "new and material evidence" section of the defendant's second motion for new trial relies almost exclusively on the defendant's trial testimony and his pro se "Affidavit—Facts of Incident" (referenced in the defendant's appellate brief as "Affidavit 7/28/10"), which he prepared on July 28, 2010 and filed into the trial court record on August 4, 2010, approximately one year before his capital trial. Given that the defendant was the author of that pro se affidavit and he was fully aware of his own trial testimony, nothing presented in the second motion for new trial appears to be the type of evidence that was unavailable to the defense at the time of the defendant's capital trial, or at the latest, at the time he filed his original motion for new trial. Despite the defendant's actual knowledge of the events, the second motion for new trial avers that the "newly discovered" evidence "remained unavailable to defendant."

In the second motion for new trial, appellate counsel further suggests that had the jury heard from the fourteen witnesses, which the defendant repeatedly sought, pro se, to have subpoenaed, the outcome of trial would have been different. However, this issue was not *newly*-discovered at the time the second motion for new trial was filed. The pro se subpoena issue was the subject of trial court hearings as far back as 2009, some two years before the defendant's capital trial, and even then, the relevance to the defendant's capital trial of those fourteen witnesses was never established. Appellate counsel also uses the second motion for new trial to revive the right-to-counsel issue, which was previously urged in the original motion for new trial, and was argued at length during the hearing on the original motion for new trial.

Given that this assignment of error involves a *second* motion for new trial, LSA–C.Cr.P. art. 856 applies: "A motion for a new trial shall urge all grounds known and available to the defendant at the time of the filing of the motion. However, the court may permit the defendant to supplement his original motion by urging an additional ground, or may permit the defendant to file an additional motion for a new trial, prior to the court's ruling on the motion." Here, the defense failed to discharge its affirmative duty to present all grounds known and available to it in the initial motion for new trial. The defense offers no explanation as to why it failed to present the travel itinerary of the defendant, alleged to establish his alibi and which was surely known to the defendant from the start of this prosecution, in the first motion for a new trial.

Moreover, the "newly" discovered evidence presented in the second motion for new trial is not material. Evidence is material only if it is reasonably probable that the result of the proceeding would have been different had the evidence been disclosed. *State v. Marshall*, 94–0461, p. 16 (La. 9/5/95), 660 So.2d 819, 826 (citing *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)). A reasonable probability is one that is "sufficient to undermine confidence in the outcome." *State v. Marshall*, 94–0461 at p. 16, 660 So.2d at 826. In *State v. Watts*, 00–0602, p. 9 (La. 1/14/03), 835 So.2d 441, 449, this court held that a trial court should ascertain on a motion for new trial "whether there is new material fit for a new jury's judgment." The only issue is "whether the result will probably be different." *Id.* Herein, nothing presented in the defendant's second motion for new trial is either new or material; it merely restates arguments raised in his initial motion for new trial, which the trial court had

already denied on the merits, following a lengthy contradictory hearing.

It is well established in our jurisprudence that the granting or refusing to grant a motion for a new trial rests within the sound discretion of the trial judge and will not be disturbed on review in the absence of clear abuse. *State v. Credeur*, 328 So.2d 59, 62 (La. 1976) (citing *State v. Randolph*, 275 So.2d 174, 177 (La. 1973), and *State v. Jackson*, 253 La. 205, 215, 217 So.2d 372, 376 (1968)). Under these circumstances, the trial court did not abuse its discretion by denying the second motion for new trial on timeliness grounds, as the filing by certified mail was untimely by three days. Moreover, the second motion for new trial failed to establish "new and material" evidence, which had it been introduced would probably have changed the outcome in defendant's capital trial, as required by LSA–C.Cr.P. art. 851(B)(3). This assignment of error is without merit.

Failure to Hold Post–Verdict Competency Hearing

In the defendant's sixteenth assignment of error, he asserts that the trial court erred in refusing to hold a post-verdict competency proceeding to re-assess the defendant's mental capacity. Approximately four months after the defendant's conviction in his capital trial, but before the trial court imposed the jury's recommended sentence of death, appellate counsel filed a motion for a sanity commission, seeking to have the defendant's mental capacity evaluated for a second time.

At a hearing held on January 23, 2012, appellate counsel argued that, notwithstanding the original sanity commission's findings "early on" that the defendant was competent to proceed to trial, "things did change" and the defendant's "unquestionably bizarre behavior"

warranted appointment of a second sanity commission. Following the hearing, the trial court denied the motion.

On appeal the defendant now contends that the trial judge was put on notice—both before and during trial—and failed to make further inquiry into the defendant's competence, violating statutory law and due process principles.

Louisiana Code of Criminal Procedure Article 642 provides: "The defendant's mental incapacity to proceed may be raised at any time .... When the question of the defendant's mental incapacity to proceed is raised, there shall be no further steps in the criminal prosecution, except the institution of prosecution, until the defendant is found to have the mental capacity to proceed." This court has recognized that the issue of mental capacity to proceed may even be raised after conviction. *See State v. Clark*, 367 So.2d 311, 312 (La. 1979). *See also State v. Payne*, 586 So.2d 652, 654 (La. App. 5 Cir. 1991). The Supreme Court has held that "[e]ven when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope v. Missouri*, 420 U.S. 162, 181, 95 S.Ct. 896, 908, 43 L.Ed.2d 103 (1975).

[42] Generally, a person who suffers from a mental disease or defect, which renders him incapable of understanding the nature and object of the proceedings against him, of consulting with counsel, and of assisting in preparing and conducting his defense, may not be subjected to trial. LSA–C.Cr.P. arts. 641 649.1; *State v. Rogers*, 419 So.2d 840, 843 (La. 1982) (citing *Drope v. Missouri*, 420 U.S. at 171, 95 S.Ct. at 903, and *State v.*

Bennett, 345 So.2d 1129, 1136–38 (La. 1977)). Given the presumption of sanity in Louisiana, the defense carries the burden of proving by a preponderance of the evidence that, as a result of a mental disease or defect, the defendant lacks the capacity to understand the proceedings against him or to assist in his defense. *State v. Bennett*, 345 So.2d at 1138.[54] The determinations of the trial judge as to competency of the defendant to stand trial are entitled to great weight on review and will not be overturned absent an abuse of discretion. *State v. Rochon*, 393 So.2d 1224, 1228 (La. 1981).

In the present case, just a few months post-indictment, the trial court ordered a sanity commission to evaluate the defendant at the behest of his then-appointed public defenders. The trial judge appointed Dr. Richard W. Williams, a psychiatrist, and Mark P. Vigen, Ph.D, a psychologist, to evaluate the defendant. Both experts submitted confidential reports to the trial court. Dr. Vigen assessed the defendant's full scale IQ score as 89, with his verbal IQ measured at 95, and his Performance IQ at 83.[55] Dr. Vigen diagnosed the defendant with narcissistic personality disorder, but found no active mental state that would interfere with

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[54] *See also* LSA–R.S. 15:432 ("A legal presumption relieves him in whose favor it exists from the necessity of any proof; but may none the less be destroyed by rebutting evidence; such is the presumption ... that the defendant is sane and responsible for his actions ....").

[55] An IQ score of 75 or below warrants further inquiry into whether a defendant has an intellectual disability. *See Brumfield v. Cain*, — U.S. ——, ——, 135 S.Ct. 2269, 2278, 192 L.Ed.2d 356 (2015); *Hall v. Florida*, — U.S. ——, ——, 134 S.Ct. 1986, 1996–2001, 188 L.Ed.2d 1007 (2014); *State v. Dunn*, 01–1635, p. 25 (La. 5/11/10), 41 So.3d 454, 470, *cert. denied*, 562 U.S. 1063, 131 S.Ct. 650, 178 L.Ed.2d 480 (2010).

his rational understanding of the proceedings against him or his ability to assist his counsel in his defense. Similarly, Dr. Williams found the defendant exhibited no evidence of intellectual disability.[56] Dr. Williams diagnosed the defendant with antisocial personality disorder, with narcissistic features, and found the defendant capable of understanding, assisting, and testifying in his own defense. On November 14, 2008 the trial judge held a hearing on the record with the attorneys present and ruled: "This Court does find that Mr. McCoy is competent to assist his attorney in this matter and is competent to stand trial according to Dr. Richard Williams and according to Dr. Mark Vigen. The Court finds this case is able to go forward."

In his appellate brief to this court, the defendant asserts that before and during trial, the trial judge was put "on notice" that there was "a bona fide doubt as to defendant's competence to proceed," as repeatedly advised by the defendant's trial counsel, Mr. English. To put the issue in context, we review a few of the trial court incidents during which the defendant's competence was questioned by his trial counsel.

On January 4, 2011 (when defendant's capital trial was slated to commence the following month, on February 7, 2011), Mr. English apprised the trial court that defendant had ordered him not to develop any mitigation evidence, even though Mr. English stated he "believe[d] that those experts are important ... if there is a guilty verdict and he face[s] a capital sentencing." Mr. English notified the court that he was not abiding by

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[56] *See* LSA–C.Cr.P. art. 905.5.1 ("Notwithstanding any other provisions of law to the contrary, no person with an intellectual disability shall be subjected to a sentence of death.").

the defendant's wishes, but was adhering to his ethical duty to provide a defense that was in the defendant's best interest. Mr. English advised the trial judge that "my client is suffering from some severe mental and emotional issues that [have] an impact upon this case." "I do not believe that Mr. McCoy is capable of making value judgments in this case about his defense and I ask him ... that he not make any statements in this courtroom." One of the issues before the court on January 4, 2011 was the defendant's pro se motions and subpoena requests, which the defendant had persisted in filing notwithstanding that he was represented by retained counsel. At the conclusion of the hearing that day, Mr. English announced that the defendant "has accepted my advice to not speak in this court today." Thereafter, the defendant's pro se motions were withdrawn.

On January 24, 2011 (with the trial still slated to commence on February 7, 2011), the trial court held a hearing on the State's motion to "flush out the issue" of whether the defendant, having been declared indigent, was entitled to two attorneys under Louisiana Supreme Court Rule XXXI. The defendant's express waiver of a second trial counsel was necessary, and the trial court took great care to explain the advantages of a second trial counsel to the defendant and to ensure that the defendant was aware of his Miranda rights. The defendant replied to the trial court, "I'm fully competent upon understanding everything [the trial judge] has to say to me, sir." Even though trial counsel advised the defendant not to speak on the record, the defendant reminded the trial judge that when Mr. English enrolled in March 2010, it was with the stipulation that he would "put a legal team together," observing that it now looked like the team was going to come from mem-

bers of the local public defender's office, some of whom were present in court. The defendant made it clear that any involvement of public defender's office in his case was unacceptable to him, explaining, "I've had problems with the public defender's office, Your Honor, from day one."

The defendant waived appointment of a second attorney to assist in his capital case under Louisiana Supreme Court Rule XXXI, and the hearing moved on to the topic of funding for mitigation experts. Mr. English announced that Dr. Mark Vigen, Dr. Craig Forsyth, and John Craft would be mitigation experts for the defendant. The district attorney announced that the State would be ready for trial on February 7, 2011, whereupon Mr. English disclosed that his experts would need more time to prepare for trial. The defendant took the opportunity to report to the trial court the difficulty he was having getting trial counsel to issue the subpoenas he requested, and the trial judge advised him that the subpoenas he was asking about had not been issued in proper form, which is why they were quashed. The trial judge clearly informed the defendant that he was free to properly subpoena those witnesses through his attorney. The ensuing colloquy between the defendant, his trial counsel, and the trial judge illustrate the defendant's intellectual capacity and the absence of any intellectual disability:

> MR. MCCOY: ... Mr. Larry English told me that I cannot subpoena a sitting judge. And I know that is very contrary to the record.
>
> THE COURT: ... Mr. McCoy, you are being advised by Mr. English on that ....
>
> MR. MCCOY: I understand, but—

THE COURT: If proper procedure is followed, Mr. English will follow your instructions, or not follow your instructions, based on his advice.

MR. MCCOY: But Mr. English works for me, Your Honor. Mr. English is—

THE COURT: I understand that, Mr. McCoy.

MR. MCCOY: —required to follow the instructions that I give Mr. English, Your Honor.

THE COURT: I understand that, Mr. McCoy, but that's between you and your attorney.

MR. ENGLISH: Your Honor, I need to state something on the record.

THE COURT: Yes, sir.

MR. ENGLISH: I believe that Mr. McCoy has severe mental issues.

MR. MCCOY: No, sir, that is not going to work on the record, Your Honor.

* * *

MR. ENGLISH: Let me finish, Your Honor. I believe Mr. McCoy has severe mental issues. Mr. McCoy has made statements to me that has caused me to have some concerns even though I know there's been a sanity commission ... put in place. I'm going to reiterate to the ... Court again, Your Honor, I believe Mr. McCoy has severe mental issues. That is a mitigating factor in this case as the reason why my motion to continue to allow Dr. Mark Vigen to do a full evaluation of him, Your Honor, to bring those issues forward. Mr. McCoy has made statements to me, Your Honor. He is—he is irra-

tional .... He's asking me to do ... things which I ... cannot do that goes ... counter what his interests are in this trial. I believe, Your Honor, it is imperative that this Court grant me a continuance so that I can have Mr. McCoy evaluated in some detail by Mark Vigen to present that evidence as mitigating facts in this case, Your Honor. We're all in this courtroom. It is what it is. All of us in this courtroom, we had an opportunity to evaluate Mr. McCoy, Your Honor .... I have tried to give Mr. McCoy the best counsel I can. Mr. McCoy, Your Honor, continues to make statements that are irrational. He continues to ask me to do things, Your Honor, that if I followed his advice would almost certainly lead to a conviction and a jury issuing a death penalty in this case. That is the reason why I am asking ... Your Honor, for a continuance in this case ... given that Mr. McCoy has exhibited very bizarre behavior to me that warrants ... being further evaluated, Your Honor, ... and there are mitigating circumstances in this case.

* * *

MR. MCCOY: Your Honor, to address that matter, *Mr. English is putting on the judicial record that there is something wrong with me and I defer that to Your Honor.* Let me share what my problem is with Mr. English, Your Honor ....

* * *

THE COURT: Mr. McCoy, please listen to me. You're fixing to reveal attorney/client privilege. You're fixing to put this all on the record

.... Sir, if ever a person needed to exercise their rights to be quiet and to use their right to remain silent, this is one of those cases, sir .... Mr. English has advised you. I'm advising you. I cannot stop you from making a statement, Mr. McCoy.

MR. MCCOY: But, Judge Cox, this—this really needs to be heard though. This really needs to be put on the record, not just for court documents but for validation. When your own attorney, Your Honor, tells you that the District Attorney brung [sic] a plea saying that you got your fingerprints on the gun; that the victims' blood is on your clothing; ... when it comes to evidence that there is no victims' blood on your clothing; that there's no fingerprints on the gun .... Mr. English has been very deceptive towards me. Mr. English do not want me to talk, Your Honor, because Mr. English has fed me nothing but a whole bunch of mishaps since we have been in this. Did he say I'm irrational, Your Honor? Because, I'm not going to let him tell me anything, Your Honor. I know what I've done and I know what I didn't do, Your Honor. Mr. English has told me there is no way he can win this case ....

MR. ENGLISH: ... I'm going to again advise Mr. McCoy ... not to continue to divulge attorney/client conversations. And I'm going to reiterate to the Court, Your Honor, why I'm making a motion to continue. I apologize to the Court while I'm making a Motion to Continue .... Mr. McCoy, Your Honor, ... is severely mentally compromised.

MR. MCCOY: No, sir.

MR. ENGLISH: He is ... continuing, Your Honor, against all advice of counsel to not listen to me when his life is on the line .... If I followed Mr. McCoy's advice, I'd be put in a position, Your Honor, that I've never been put into my time as a lawyer of not following my client's advice. Your Honor, ... this is a predictor. You're watching this man's behavior. It is bizarre.

MR. MCCOY: No, it's not, Your Honor.

MR. ENGLISH: I need a mental health expert appointed to evaluate Mr. McCoy, Your Honor .... Mr. McCoy is going to attempt to take over this trial and argue in front of the jury. And when he does that, Your Honor, I have the responsibility of then standing in front of the jury and fighting for his life .... This man is irrational. He is severely emotionally and mentally compromised .... He will not and cannot assist me. He is going to fight me. He is going to take over this trial .... This man needs to be evaluated, Judge, and that evidence needs to be brought before a jury at the proper time ....

* * *

MR. MCCOY: But, Your Honor, if I don't put it on the judicial record and Mr. English still don't agree with the things that I'm asking him to do as far as subpoenaing people, Your Honor, if we go to trial without these proper people subpoenaed, Your Honor, that's a worse situation for me, Your Honor. Just like, Your Honor, the eyewitness that gave the description of

the person at the scene of the crime, Your Honor, that hasn't been turned over to me for discovery so I could subpoena that person so that person can validate, Your Honor, that that wasn't me at the crime, Your Honor. The District Attorney haven't turned it over to us, Your Honor, and that's exculpatory evidence to prove my innocence ....

* * *

MR. ENGLISH: Your Honor, the District Attorney, to my knowledge, turned over all discovery to date.

MR. MCCOY: No, he didn't.

MR. ENGLISH: May I finish? Your Honor, Mr. McCoy is asking me to subpoena witnesses to put forth a theory ... that will help the District Attorney send him to the death chamber. I will not follow his advice. I will not subpoena FBI agents. I will not subpoena judges. I will not ... not run all over the country looking for witnesses that don't exist. Mr. McCoy is severely mentally compromised, Your Honor, ... and I'm asking this Court to grant my Motion to Continue so that he can be evaluated because this is going to be the case. It is going to be a zoo.

MR. MCCOY: No, it's not, Your Honor.

MR. ENGLISH: It's going to be a zoo, Judge, because I'm not going to do what he wants me to do. I can be relieved from this case. I do not believe this man is rational. I think I have an ethical duty .... I have sought legal counsel from other death penalty lawyers on advice on this.

> I have an ethical duty to this man not to follow his bizarre behavior .... And I'm asking this Court to please allow me to have this man evaluated, Your Honor, because he is mentally and emotionally compromised.
>
> MR. MCCOY: And, Your Honor, for the record, and I'm going to end my conversation, Your Honor. *Your Honor, I've been evaluated. There is ... nothing wrong with me, Your Honor .... Mr. English wants the Court to believe something is wrong with me to further evaluation that has already been evaluated before, your Honor. There is nothing wrong with me. I'm fully competent. I'm fully understanding of the aspects of this case ....*
>
> MR. ENGLISH: I'm going to advise Mr. McCoy to be quiet, Your Honor.
>
> * * *
>
> MR. MCCOY: Let—let me talk here.
>
> MR. ENGLISH: ... He's now saying stuff, Your Honor, that goes to the heart of his defense and he's compromising his case.

[Emphasis added.]

At the conclusion of the hearing, the trial court denied trial counsel's motion for a continuance, and the ruling was ultimately overturned by the Second Circuit, which stayed the proceedings and remanded the case back for consideration of the second counsel issue; the defense having prevailed in obtaining a continuance, the trial was rescheduled for July 28, 2011.

On July 12, 2011 (with trial set for July 28, 2011), the trial court held a hearing, once again, to quash sub-

poenas requested by the defendant, pro se. On this date, the defendant voiced his displeasure with Mr. English's reluctance to abide by his wishes and issue the subpoenas for the alibi witnesses he wanted for trial, pointing out, "There's a zeal that an attorney is supposed to have for his client and that zeal is not being met here." Mr. English responded, "I have no ethical duty as a lawyer to hold Mr. McCoy's hand while he walks into the death chamber .... I have an ethical duty, Your Honor, to try to defend him and do the ... best I can to save his life." Afterwards, Mr. English assured the trial court that he would "not call those witnesses if they are subpoenaed." Mr. English reiterated, "I do not believe that Mr. McCoy has the mental capacity to assist himself to—to insist on going down this path, Your Honor, is reckless."

On July 26, 2011, two days before trial, Mr. English told the court, "I was informed by Mr. McCoy this weekend that it was his intention to terminate my services." The defendant explained, at length, to the court that he no longer wished to be represented by Mr. English because counsel was trying to make him "cop out to three counts of first degree murder." Mr. English confirmed that "we have an irrevocable disagreement between how to proceed in this case." Even though Mr. English requested to be allowed to withdraw as counsel in the case, the trial judge refused that request. Thereafter, during his opening statement on August 3, 2011, Mr. English told the jury, "Robert McCoy is crazy."

As the quoted incidents establish, when the defendant's trial counsel asserted that defendant was irrational, incompetent, or crazy, the defendant would rationally respond to deny the assertions. Throughout such proceedings in which the defendant complained to

the trial judge that his trial counsel would not investigate and secure evidence to put forth his desired alibi defense, the trial judge had the benefit of witnessing firsthand the defendant's demeanor and his pro se performance in court, during which the defendant strongly defended himself against his trial counsel's claims that his behavior was crazy or abnormal. The State observes, in brief to this court, that the defendant was disruptive in court when he disagreed with trial counsel "but exercised self-control when he wanted to."

Against this backdrop of trial court exchanges, we review the applicability in this case of LSA–C.Cr.P. art. 643, which requires a trial court to appoint a sanity commission "when it has reasonable ground to doubt the defendant's mental capacity to proceed." Reasonable ground in this context refers to " 'information which, objectively considered, should reasonably have raised a doubt about defendant's competency and alerted [the court] to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense.' " *State v. Snyder*, 98–1078, p. 24 (La. 4/14/99), 750 So.2d 832, 851 (quoting *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980)). The fact that the defendant's capacity to proceed is called into question does not, for that reason alone, require the trial court to order a mental examination of the defendant. *State v. Cyriak*, 96–0661, pp. 8–9 (La.App. 3 Cir. 11/6/96), 684 So.2d 42, 47. In *State v. Synder*, 98–1078, p. 23 (La. 4/14/99), 750 So.2d 832, 850,[57] the court stated that,

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[57] We note that *State v. Snyder* is distinguishable from the instant case. In *State v. Synder*, a sanity commission had found the defendant competent to proceed and counsel conceded that the defendant was "technically competent," in that he had an understanding of the proceedings against him. However, the sanity

"when such claims, combined with objective medical evidence, raised a sufficient doubt as to defendant's competence, we must question whether defendant received a fair trial in this regard."

While appellate counsel, in this case, offers no objective medical evidence, he suggests that the testimony of various law enforcement officers at the guilt phase, who testified as to the defendant's various pretrial suicide attempts,[58] demonstrate "reasonable grounds" that should have prompted the trial judge to order a reexamination of the defendant's mental capacity. However, in *Drope v. Missouri*, the Supreme Court recognized that "'the empirical relationship between mental illness and suicide' or suicide attempts is uncertain and that a suicide attempt need not always signal 'an inability to perceive reality accurately, to reason logically and to make plans and carry them out in an organized fashion.'" *Drope v. Missouri*, 420 U.S. at 181 n.16, 95 S.Ct. at 908 n.16 (quoting Greenberg, "Involuntary Psychiatric Commitments to Prevent Suicide," 49

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commission doctors also found that the defendant was so depressed he had some difficulty in communicating and they recommended a change in medication. This court held that, under these circumstances, the trial court abused its discretion by taking absolutely no steps to investigate the problem despite objective medical corroboration of counsel's complaints and by denying counsel's motion to continue trial (and also denying counsel an opportunity to make an ex parte showing of the problems she was having with the defendant) for four or five weeks while the defendant's new medication reached maximum therapeutic levels.

[58] Trial testimony indicated that the defendant had, after he was first apprehended in Idaho, attempted to hang himself in the Idaho jail, that he later swallowed a razor blade, that he later swallowed a large quantity of paper, and on another occasion he bit into his arm.

N.Y.U.L.Rev. 227, 234–36 (1974)). When the defendant, in this case, testified at trial on his own behalf and was asked about whether he had wanted to kill himself, he responded, "As you see, I love me. What am I going to kill myself for?" The defendant denied attempting suicide and told the jury that the suicide watch he was placed under in Lewiston, Idaho was a sham to cover up the fact that the officers there had beaten him.

That the defendant's mental capacity did not degenerate from the time of his sanity commission in 2008 through the course of 2011 trial was evidenced by the defendant's own statements at trial, which demonstrated his efforts to educate himself on relevant legal issues. During questioning about adverse statements made by witness Gayle Houston, his childhood friend, the defendant related that the district attorney "had told him [Mr. Houston] that they was going to tie him into it as an accessory to the fact [and] ... that's a threat .... That's coercion." The defendant continued, in his testimony, "[T]hey coerced him ... to the point that he couldn't make an intelligent decision on his own. That's the aspects of Mintzy (sic) versus Arizona. You can't coerce a person. You can't lead a person. You can't vindicate the aspects of your law to a person in which they—they're not able to make a probable decision."

Also, during his trial testimony, the defendant was being asked about whether he was the person seen purchasing ammunition at Walmart on the date of the murder and whether he was the person seen by Officer Szyska jumping out his white Kia automobile on the night of the murder and running away, and the defendant replied:

> *State versus Tilley* vindicates that the description of a suspect has to be sufficient and in de-

> tail. You can't speculate and say this is someone. You have to know that that is someone. There are a lot of people on death row right now because someone speculated because that is someone. You have to be specific. You have to know if that's Robert McCoy, that's Robert McCoy; if that's McGee, that's McGee.

At the post-trial January 23, 2012 hearing on the defense motion for the appointment of a second sanity commission, appellate counsel pointed to trial counsel/Mr. English's specific and emphatic declarations to the trial court that the defendant was incompetent and unable to assist in his defense. Appellate counsel also pointed to the allegations that the defendant had attempted suicide. Appellate counsel further claimed that following the verdict, he had solicited the help of Dr. Frank Gresham, a psychologist with expertise in administering intelligence testing, and asserted that Dr. Gresham opined that the verbal score obtained in the defendant's earlier IQ testing was inflated by eleven points and that the full scale IQ score was inflated as a result of the error.

The district attorney countered that the defendant was examined pre-trial by Dr. Vigen, a member of the 2008 sanity commission that found the defendant competent to proceed. The district attorney reminded the trial court that Dr. Vigen was subsequently retained by the defense (after obtaining a requisite waiver from the State), as their mitigation expert for trial purposes, evidencing the defense's high regard for Dr. Vigen. The district attorney further pointed out that, at trial, Dr. Vigen testified that the defendant's mental health was such that he was competent and capable of standing trial. The district attorney further asserted that "there is absolutely nothing that indicates that since that

[original] testing that his mental health has deteriorated to the point that he should not be competent to stand trial and assist in his defense."

At the conclusion of the January 23, 2012 hearing, the trial court denied the motion for appointment of a post-verdict sanity commission and, relying on *State v. Holmes*, stated that "it was not surprising for a defendant facing a capital murder trial to become depressed and contemplate suicide." The trial judge also cited *State v. Bridgewater* (wherein the defendant requested a sanity commission, after a sanity commission one year previously found the defendant competent, and no additional medical evidence was brought forth to challenge the determination of competency) as similar to the instant case. Herein, the trial judge stated that "[o]bjections by attorneys, standing alone, are not enough to require a commission," cogently summarizing his appreciation of the defendant's mental state:

> [I]t's my belief that Mr. McCoy completely understood the seriousness of the charges against him. After all, he wrote scores of his own motions regarding his case. Many of those motions were legally on point. If he didn't understand the seriousness of the charges or the way the legal system works, he wouldn't have filed everything that he did. If we were to accept movant's claim at face value and determine that a court determine sanity at the drop of a hat, then every time a defendant acted differently before trial, or argued with his attorney, or said I'm mentally incompetent, everything would have to stop until a new commission was held and found the defendant to be competent to stand trial. While it is true that Mr. English stated he thought Mr. McCoy lacked the capac-

> ity to help defend himself in this case, we need to recognize that Mr. McCoy only wanted to plead not guilty, and Mr. English determined that the best trial strategy would be to plead guilty, according to Mr. English. A major reason that Mr. McCoy would be unable to assist in his own defense is due to the major divide over trial strategy. This court cannot set a precedent that permits a finding of lack of capacity when the defendant disagrees with trial strategy and refuses to speak to their attorney out of anger. Using the factors of *US versus Moghaddam*, a case that movant relies upon but fails to cite, Mr. McCoy's history of irrational behavior was limited .... Mr. McCoy has a criminal history which doesn't show irrationality, just a disrespect of the law. While Mr. McCoy's behavior at trial warranted his removal from the courtroom, after being told to, he did settle down. Prior medical opinions, specifically the medical opinion that created the report, stated he was mentally competent to stand trial .... Dr. Vigen was called to testify at the trial, had the opportunity to visit with Mr. McCoy further, and never raised that Mr. McCoy was incompetent or not competent to stand trial. For those reasons, I deny that motion.

The present case fails to demonstrate that reasonable grounds existed at the time of sentencing to convene a second sanity commission. *State v. Hicks*, 286 So.2d 331, 333 (La. 1973) (wherein defense counsel presented no evidence on the motion for appointment of a sanity commission and the psychiatrist asked by the court to examine the defendant reported that the defendant ap-

peared to have the capacity to proceed; thus, "[t]he only logical conclusion that can be drawn from this record is that the defense has failed to convince the court that there was a reasonable ground to doubt the defendant's mental capacity to proceed."). Similarly, in the present case, trial counsel told the trial court repeatedly that he believed the defendant had severe mental issues, but brought forth no objective medical evidence to support his belief sufficient to raise the "reasonable ground" required under LSA–C.Cr.P. art. 643. Consequently, the mere repetition of the allegation did not put the trial judge on notice of a bona fide change in the defendant's mental functioning. Furthermore, appellate counsel's reliance on the defendant's alleged suicide attempts is misplaced since all of those incidents predated the defendant's 2008 evaluation by the initial sanity commission. Here, the trial judge specifically noted that he had heard no reasonable ground or any medical evidence to support ordering a new sanity commission. The trial judge's ruling is entitled to great weight on review, and we find no abuse of discretion in his decision to deny the post-verdict motion for the appointment of a sanity commission. We find no merit in this assignment of error.

Capital Sentence Review

Under LSA–C.Cr.P. art. 905.9 and Rules of the Supreme Court of Louisiana, Rule XXVIII, this court reviews every sentence of death imposed by Louisiana courts to determine if it is constitutionally excessive. In making this determination, pursuant to Rule XXVIII, Section 1, this court considers: whether the jury imposed the sentence under the influence of passion, prejudice, or any other arbitrary factors; whether the evidence supports the jury's findings with respect to a

statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender.

Pursuant to Rule XXVIII, Section 3, a Uniform Capital Sentence Report ("UCSR") and a Pre–Sentence Investigation Report ("PSI") were filed into the appellate record for review by this court. In addition, the State and the defense have filed sentence review memoranda, and the defense filed objections to the UCSR and PSI, contending only a de minimis mitigation investigation was performed in this case and specifically claiming there was a deficiency in detail as to the defendant's educational and employment history.

These documents, along with the defendant's guilt phase testimony and Dr. Vigen's penalty phase testimony, indicate that the defendant, Robert Leroy McCoy, is an African–American male, born on October 2, 1973, and is the second oldest of five children born to the marital union of Robert McCoy, Sr. and Mary McCoy. The defendant was raised by both parents in a home in the Eden Gardens neighborhood of Shreveport, where his parents still reside. Mrs. McCoy worked as a sitter and performed domestic work before becoming disabled, due to congestive heart failure, and Mr. McCoy did cement work for various construction companies before retiring. The defendant mentioned an older half-brother and half-sister born to his father. At trial, the defendant described his childhood as "fair," and that they were "working class" but there was always food on the table. The defendant stated that he was educated at Eden Gardens Elementary, Ridgewood Middle School, and C.E. Byrd High School, where he participated in football, weight-lifting, and ROTC. The defendant claimed to have graduated high school with a 3.8 grade point average.

The defendant had no military service. His employment history, through 1999, was with Dominos, the Sheraton Hotel, the casinos, and Foremost Dairy. From 1999 to 2001, he worked as a deckhand for Nabor's Drilling; from 2001 to 2002, he worked at Langston Drilling; from 2002 to 2006, he ran a lawn service called The Real McCoy; and from 2006 to 2008, he worked for Greystone Drilling and Union Pacific Railroad.

The defendant married Yolanda Colston in 2005, during which time a daughter was born, but the defendant stated that he is not certain he is her father. The defendant reported no prior marriages, but has four children from four previous relationships: a daughter born in 1996, and three sons born in 1999, 2000, and 2005. The defendant was raised in the Baptist church and most recently was a member of Stonewall Baptist Church in Bossier City, where he and Yolanda sought counseling with the pastor.

The defendant denied abusing alcohol or any illegal substances. He underwent anger management counseling while incarcerated at Caddo Correctional Center on a previous offense. Since his arrest on the instant triple homicide, the defendant purportedly attempted suicide at least four times, all of which he denied, attributing his injuries to mistreatment by law enforcement. The sanity commission experts evaluated the defendant as having an exaggerated view of his self-worth, tending to rewrite reality in order to maintain his positive image, and having a Narcissistic Personality Disorder with antisocial and paranoid features.

The defendant has no juvenile criminal record, and excluding the crimes charged in the current case, the defendant's adult criminal record includes convictions

for the following: March 30, 1997, simple criminal damage to property; March 18, 1999, simple criminal damage to property; September 7, 2000, no license plate light; April 24, 2001, attempted second degree kidnapping; and April 2008, aggravated battery.

The defendant is considered a third felony offender. The PSI notes his history of violent behavior has escalated and opined that he "cannot be rehabilitated." In the defendant's statement for the PSI, he denied committing the murders stating "he would never have hurt his family in that way." The defendant further stated that his trial counsel "sold me out," and "the District Attorney and Police Department are hiding the truth of this horrific crime."

Passion, Prejudice, or Other Arbitrary Factors

The first degree murders of Christine Colston Young, Willie Young, and Gregory Colston occurred on May 5, 2008. Following jury selection, trial commenced on August 3, 2011, approximately three years after the crime was committed.

The defendant is an African–American, as were all three victims. The victims were the mother, stepfather, and son of the defendant's estranged wife, Yolanda Colston. Additionally, Willie Young was the defendant's cousin.

The defendant's jury was composed of one African–American juror and eleven Caucasian jurors. Trial counsel raised several *Batson* claims at the defendant's trial, as to which the trial court found no discriminatory intent by the State. Appellate counsel re-urged the *Batson* claims in this appeal, and as discussed hereinabove relative to the defendant's tenth assignment of

error, we concluded the *Batson* claims had no merit, as race was not an issue at trial.

At the time of the triple homicide, manhunt, and the defendant's suicide attempts, the defendant's case commanded some media attention, but not an abundance. At least one article was published about allegations of beatings of inmates, including the defendant, at Bossier Max. During the time that the defendant was acting as his own counsel, he filed and argued a motion to change venue based on pretrial publicity, which the trial court denied.

Appellate counsel argued that the State interjected an arbitrary factor into the defendant's sentencing hearing when it admitted Exhibit S–101, a tribute article written about Gregory Colston entitled, "The World Has Lost a Dreamer," which was published in the local newspaper after the murders. Appellate counsel claims that the error of admitting such an inflammatory victim article was compounded by the State making copies and distributing them for the jurors to review in the deliberation room. In this court's discussion of the defendant's thirteenth assignment, supra, we concluded that the article provided no more than a "quick glimpse" into the life of victim Gregory Colston, and any error associated with the jury's review of the written article was harmless; thus, no arbitrary factor appears to have been interjected by Exhibit S–101.

In the defense sentence review memorandum, it is argued that the defendant's execution would be arbitrary, given that he was represented by a single attorney at his bifurcated capital trial and that his attorney was not capitally-certified. The defense asserts that trial counsel conceded the defendant's guilt in the triple homicide, thereby effectively relieving the State's bur-

den of proving the sole aggravating factor upon which the jury rested its sentencing recommendation, pursuant to LSA–C.Cr.P. art. 905.4(A)(4) ("The offender knowingly created a risk of death or great bodily harm to more than one person.").

Aggravating Circumstances

The State relied upon three aggravating circumstances under: LSA–C.Cr.P. art. 905.4(A)(1)—the offender was engaged in the perpetration or attempted perpetration of aggravated burglary; LSA–C.Cr.P. art. 905.4(A)(4)—the offender knowingly created a risk of death or great bodily harm to more than one person; and LSA–C.Cr.P. art. 905.4(A)(7)—the offense was committed in an especially heinous, atrocious, or cruel manner. The jury based its verdicts in the sentencing phase on LSA–C.Cr.P. art. 905.4(A)(4), finding that the defendant created a risk of death or great bodily harm to more than one person. The record is replete with evidence supporting that aggravating circumstance. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[47] At the guilt phase, the jury heard Christine Colston Young's frantic 911 call, from which the jurors could infer that the defendant's arrival and entry into her home was uninvited and unauthorized. The trial court instructed the jury on the elements of aggravated burglary at the penalty phase, but otherwise, the State did not emphasize that aggravating circumstance. Likewise, the jury declined to find that the triple homicide, in which each of the victims succumbed to a single gunshot wound to the head, was committed in an especially heinous, atrocious, or cruel manner. This court has held on numerous occasions that the failure of one or more statutory aggravating circumstances does not

invalidate others properly found, unless introduction of evidence in support of the invalid circumstance interjects an arbitrary factor into the proceedings. *State v. Tate*, 01–1658, p. 23 (La. 5/20/03), 851 So.2d 921, 939, *cert. denied*, 541 U.S. 905, 124 S.Ct. 1604, 158 L.Ed.2d 248 (2004); *State v. Letulier*, 97–1360, p. 25 (La. 7/8/98), 750 So.2d 784, 799.

In the instant case, evidence of the aggravating circumstances did not interject an arbitrary factor into these proceedings because evidence of the manner in which the offense was committed and of the nature of the victim's injuries was relevant and properly admitted at trial. Furthermore, the remaining aggravating circumstance, i.e., that the offender killed more than one person, was more than amply supported. Hence, the jury's sentencing decision in this case does not appear to be arbitrary or capricious. *See State v. Roy*, 95–0638, pp. 19–20 (La. 1996), 681 So.2d 1230, 1242, *cert. denied*, 520 U.S. 1188, 117 S.Ct. 1474, 137 L.Ed.2d 686 (1997). Consequently, the defendant's sentence of death is firmly grounded upon the jury's finding of the LSA–C.Cr.P. art. 905.4(A)(4) aggravating circumstance, as to each count.

Proportionality

Although the federal Constitution does not require proportionality review, as indicated in *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), comparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana. *State v. Burrell*, 561 So.2d 692, 710–11 (La. 1990), cert. denied, 498 U.S. 1074, 111 S.Ct. 799, 112 L.Ed.2d 861 (1991); *State v. Wille*, 559 So.2d 1321, 1341 (La. 1990), cert. denied, 506 U.S. 880, 113 S.Ct. 231, 121 L.Ed.2d 167 (1992). This court, however, has

set aside only one death penalty as disproportionately excessive under the post–1976 statutes, finding in one case, inter alia, a sufficiently "large number of persuasive mitigating factors." *State v. Sonnier*, 380 So.2d 1, 9 (La. 1979). *See also State v. Weiland*, 505 So.2d 702, 707–10 (La. 1987) (although this case was reversed on other grounds, dictum suggests that the death penalty was disproportionate).

This court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. *State v. Sonnier*, 380 So.2d at 7.

The State's sentence review memorandum reveals that since 1976, jurors in the 26th Judicial District Court, which is comprised of Bossier and Webster Parishes, have returned a guilty verdict in twenty-two capital cases, excluding the defendant's case and, of those, nine juries recommended the death penalty.

It is appropriate for this court to look beyond the 26th Judicial District and conduct the proportionality review on a statewide basis. *See State v. Davis*, 92–1623, pp. 34–35 (La. 5/23/94), 637 So.2d 1012, 1031, cert. denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359 (1994). This court has observed that Louisiana juries appear especially prone to impose capital punishment for crimes committed in the home. *See State v. Dressner*, 08–1366 (La. 7/6/10), 45 So.3d 127; *State v. Leger*, 05–0011 (La. 7/10/06), 936 So.2d 108; *State v. Blank*, 04–0204 (La. 4/11/07), 955 So.2d 90; *State v. Bridgewater*, 00–1529 (La. 1/15/02), 823 So.2d 877; *State v. Jacobs*, 99–1659 (La. 6/29/01), 789 So.2d 1280; *State v. Howard*, 98–

0064 (La. 4/23/99), 751 So.2d 783; *State v. Gradley*, 97–0641 (La. 5/19/98), 745 So.2d 1160; *State v. Robertson*, 97–0177 (La. 3/4/98), 712 So.2d 8; *State v. Tart*, 93–0772 (La. 2/9/96), 672 So.2d 116; *State v. Code*, 627 So.2d 1373 (La. 1993); *State v. Burrell*, 561 So.2d 692 (La. 1990); *State v. Perry*, 502 So.2d 543 (La. 1986); *State v. Williams*, 490 So.2d 255 (La. 1986); *State v. Summit*, 454 So.2d 1100 (La. 1984).

State v. Wingo observed in this regard that "[t]he murder of a person by an intruder who violated the sanctuary of the victim's own home [is] a particularly terrifying sort of crime to decent, law abiding people." *State v. Wingo*, 457 So.2d at 1170. Moreover, juries in Louisiana have not hesitated in imposing the death penalty in a variety of cases involving multiple deaths or when a defendant creates the risk of death or great bodily harm to more than one person. *See State v. Scott*, 04–1312 (La. 1/19/06), 921 So.2d 904; *State v. Brown*, 03–0897 (La. 4/12/05), 907 So.2d 1; *State v. Robinson*, 02–1869 (La. 4/14/04), 874 So.2d 66; *State v. Wessinger*, 98–1234 (La. 5/28/99), 736 So.2d 162; *State v. Robertson*, 97–0177 (La. 3/4/98), 712 So.2d 8; *State v. Baldwin*, 96–1660 (La. 12/12/97), 705 So.2d 1076; *State v. Tart*, 93–0772 (La. 2/9/96), 672 So.2d 116; *State v. Taylor*, 93–2201 (La. 2/28/96), 669 So.2d 364; *State v. Sanders*, 93–0001 (La. 11/30/94), 648 So.2d 1272; *State v. Deboue*, 552 So.2d 355 (La. 1989). Compared to these cases, it cannot be said that the death sentence in this case is disproportionate. Nothing in any of the post-trial documents, filed pursuant to Louisiana Supreme Court rule XXVIII, warrants reversal of the defendant's death sentence in this case.

DECREE

For the reasons assigned herein, the defendant's conviction and death sentence are affirmed. In the event this judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing, the trial judge shall, upon receiving notice from this court under LSA–C.Cr.P. art. 923 of finality of direct appeal, and before signing the warrant of execution, as provided by LSA–R.S. 15:567(B), immediately notify the Louisiana Public Defender Board and provide the Board with reasonable time in which: (1) to enroll counsel to represent the defendant in any state post-conviction proceedings, if appropriate, pursuant to its authority under LSA–R.S. 15:178; and (2) to litigate expeditiously the claims raised in that original application, if filed, in the state courts.

CONVICTION AND SENTENCE AFFIRMED.

CRICHTON, J., additionally concurs and assigns reasons.

CRICHTON, J., additionally concurs and assigns reasons.

I agree in all respects with the holding of this case, but write separately to spotlight the exhaustive efforts undertaken by the trial court and the state in ensuring that the representation of the defendant comported with all legal requirements. Our law and jurisprudence recognize the delicate balance which must be struck be-

tween protecting an accused's right to counsel with his or her liberty to reject counsel, as well as the duty of the trial court to maintain orderly proceedings. It is my opinion that the trial court here navigated these complex issues in exemplary fashion, and it is for this reason I agree wholeheartedly with the opinion's conclusion that Mr. McCoy's assignments of error relating to his representation are wholly without merit.

First, Mr. McCoy and his family selected Mr. English, known to the family from a prior attorney-client relationship, over and above any other attorney on the planet—despite his lack of capital certification. Notably, it was the district attorney who twice moved the court to examine Mr. McCoy's waiver of capital-certified counsel pursuant to Louisiana Supreme Court Rule XXXI. In both instances, the trial court and the district attorney advised Mr. McCoy that, as an indigent defendant, he was entitled to representation from no less than two capital-certified attorneys. Also in both instances, Mr. English reiterated on record to the court and Mr. McCoy that he was not capital certified. Mr. McCoy in both hearings adamantly and unequivocally rejected the appointment of additional or new counsel pursuant to Rule XXXI and affirmed his choice of Mr. English as his trial counsel. I cannot conceive of any other steps which the district attorney or the trial court could have taken to apprise Mr. McCoy of his rights under Rule XXXI and ensure that his waiver of those rights was both knowing and voluntary.

Mr. McCoy furthermore exhibited such a strong aversion to the public defender's office that he elected to represent himself in the interim time between dismissing the public defender's office and his retention of Mr. English. He also sought to represent himself after the trial court rejected his request to substitute counsel

two days before his trial began. However, the right to self represent and the right to counsel of choice are not absolute, and cannot "be manipulated to obstruct orderly court procedure or to interfere with the fair administration of justice." *State v. Bridgewater*, 00–1529 (La. 1/15/02), 823 So.2d 877, 896, on reh'g (June 21, 2002). Mr. McCoy's attempts to self represent or change counsel two days before the start of his trial would have wreaked havoc in this capital case; furthermore, defendants do not control court proceedings, and even Mr. English voiced concerns that Mr. McCoy was "going to attempt to take over this trial" through his representational demands. Thus, the trial court properly rejected his requests.

Finally, and though it is irrelevant to the untimeliness of the request, the stated reason Mr. McCoy wished to dismiss Mr. English—a trial strategy of conceding Mr. McCoy's guilt in hope of saving his life—is without merit. Mr. English was ethically bound under Louisiana Rules of Professional Conduct Rule 1.2(d) and Rule 3.3(b) to advance a defense which satisfies his ethical obligations to his client but also his ethical obligations to the court. Mr. English determined that, in the face of overwhelming evidence, and on the belief that advancing the defense desired by Mr. McCoy would result in the subornation of perjury, conceding guilt and pleading with the jurors for Mr. McCoy's life was his only feasible tactical option. In reviewing the facts and evidence presented, I agree that Mr. English was left with few options in presenting a defense which satisfied both ethical standards, and that he chose the best option available. *Cf. Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002) ("those courts that have confronted situations in which defense counsel concedes the defendant's guilt for only lesser-included offenses have

consistently found these partial concessions to be tactical decisions, and not a denial of the right to counsel.") (footnote omitted)).

GOEBEL & VIGEN
PSYCHOLOGISTS
[Letterhead]

October 2, 2008

CONFIDENTIAL REPORT: ROBERT LEROY MCCOY

REFERRAL INFORMATION AND OPINIONS:

Mr. Robert Leroy McCoy is a 34-year-old black male incarcerated at the Bossier Maximum Security Jail. Mr. McCoy was arrested on May 9, 2008, for the May 5, 2008, killings of Christina Colston, Willie Ray Young, and Gregory Colston. The 26th Judicial District Court ordered a competency/sanity evaluation on July 17, 2008. The purpose and limitations of the evaluation were explained to Mr. McCoy, and he agreed to proceed with the evaluation. He was cooperative in all that was asked of him.

OPINIONS:

The tests of competency involve determining whether or not the defendant is suffering from a mental illness that precludes his ability to understand the nature and consequences of the proceedings against him, and to properly assist in his own defense. It is my opinion that Mr. McCoy is not mentally impaired. He is able to understand the nature and consequences of the proceedings, and he is able to assist in his defense.

To make a determination of insanity at the time of the offense, the presence of a serious mental disorder or defect is required. Additionally, there must be a causal relationship between the mental disease and the offense behavior. Specifically, the defendant's inability to appreciate the nature and quality, or wrongfulness of

his actions must be the direct result of the individual's mental disorder. It is my opinion that Mr. McCoy has no mental disorder and that he was able to appreciate the rightfulness/wrongfulness of his actions at the time of the event in question before the Court.

ASSESSMENT PROCEDURES:

Document Review:

- Arrest History
- Bossier City Police Department records
  - Incident Report
  - 911 call and dispatch
  - Trometric Gipson interview
  - Charlotte McCoy interview
  - Carlos McCoy interview
  - Spartacus McCoy interview
  - Sharon Moore interview
- Arrest Record from Lewiston, Idaho
- Nez Perce County Sheriff Incident Reports
- St. Joseph Medical Center, Lewiston
- Bossier Maximum Security Jail
  - Intake Assessment
  - Clinic Notes
  - Incident Reports
- LSUHSC treatment records

Interviews:

- Competency/Sanity Interview-Mark Vigen
- Psychosocial Interview-Linda Grayson
- Competency/Sanity Interview-Mark Vigen and Linda Grayson

Psychological Testing:

- Health History Form
- Wechsler Adult Intelligence Scale-Ill
- Malingering Test
- Georgia Court Competency Test-MSH Revision

- Sentence Completion Test of Competency
- Test of Memory Malingering
- Competence Assessment for Defendants with Mental Retardation

SOCIAL HISTORY:

Robert McCoy was born October 2, 1973, to Robert and Mary McCoy in Shreveport. Robert said his parents were high school sweethearts and estimated they are now in their early 60's. Robert's father has worked for several cement companies, and his mother performed domestic work. Mrs. McCoy is now disabled due to congestive heart failure.

Robert was raised in Eden Gardens in a three-bedroom brick house. As the "oldest boy," Robert said he was responsible for the "kids under him" and charged with protecting and watching out for them. she got older, he also helped provide financial assistance. Robert said money was always "tight," but he and his siblings never went without the things they needed. His family was "very close," and his parents' home was the place where everyone gathered. Robert's mother took the children to Paradise Baptist Church, her family's church. Robert's father also attended Paradise Baptist but kept his membership at Mt. Olive, his family's church.

Robert is the third of six children. Smietanko "Taka" is 37 years old and employed by the City of Shreveport. Taka had a twin, who died shortly after birth. Spartacus is 32 years old and owns a lawn service. Charlotte is 27 and is a waitress at Sam's Town, and 25-year-old Carlos works for Halliburton Well Service.

Robert said his parents' had a good marriage but one with significant challenges as Robert's father has fa-

thered several children outside the marriage. His oldest children are Stephen, age 41, and Alisa, age 38. Stephen lives in California, and Alisa lives in Shreveport. Robert said he was not raised with Stephen and Alisa but was aware of them. Robert's father also has a 9-year-old daughter, Jessica.

Robert attended Eden Garden Elementary, Caddo Middle Magnet, and Ridgewood Middle School. He said he moved in with an aunt in the Hollywood area of Shreveport so he could attend Byrd High School. While a student at Byrd, he participated in football, weight lifting, and ROTC. During his senior year, he attended the Caddo Career Center's auto body program. Robert graduated from Byrd in 1992 with a 3.8 GPA. He reported no behavioral problems and was never suspended or expelled. He was not diagnosed with ADD, ADHD, or a learning disability.

After high school, Robert moved to Houston and attended the Urshan Graduate School of Theology. He obtained a Pell Grant and lived with a friend, Todd Ferrell. He did not work while attending college and graduated with an Associate's Degree in May 1996. The Urshan website indicated they are owned and operated by the United Pentecostal Church International and admission to the school requires a Bachelor's Degree.

Robert reported he worked in food service until 1999 after graduating from college. Those included Domino's Pizza, Sheraton Inn, Foremost Dairy, Harrah's, Isle of Capri, Casino Magic, Horseshoe Casino, and Hollywood Casino. He worked for Nabor's Drilling for three years from 1999 through 2001 where he began as a floor hand and worked his way up to derrick hand before leaving for another job. He worked for Langston

Drilling for 9 months before resigning in 2002 due to the lack of proper safety equipment. After leaving Langston Drilling, Robert operated his own lawn service, The Real McCoy, for four years and worked part-time for Union Pacific as a conductor and engineer. Robert stated the company conducted a background check in order to hire him full-time and discovered he had a criminal record, which prevented him from becoming a full-time employee. In 2006, he worked for Tiger Axle for several months and accepted employment with Greystone Drilling in late 2006. At the time of his arrest, he worked for Greystone and Union Pacific.

Robert stated he has not had many serious relationships during his life. He dated his first girlfriend, Natasha Jack Maiden, from 1991 to 1993. That relationship ended while Robert was away at college and Natasha began to see other men. Robert said he was hurt by Natasha and did not date again until 1995 when he became involved with Gabrielle Howard. Gabrielle and Robert had one child, Laquianisha McCoy, born February 28, 1996. Robert said Gabrielle got him in "all kinds of trouble," cheated on him, and set him up to be arrested in 1997 for assault.

His next serious relationship was in 2001 with Yolanda Bradford. Robert said their relationship ended because he caught her cheating with her ex-boyfriend. Robert said Yolanda also caused him to be arrested and made many false charges against him.

He began dating his present wife, Yolanda Michelle Colston McCoy, in early 2005. They met at a gym in Southern Hills. After a few months, he began staying at her house and began paying her bills. Robert said Yolanda would not give him a key to the mobile home, let him answer the phone, or stay at the mobile home

when she was not there. A Justice of the Peace married them in November 2005. Robert and Yolanda had one child, a daughter named Aniah Colston, born October 7, 2006. When questioned about why the baby did not have his name, Robert said he is not sure the baby is his, but he has never taken a paternity test.

Robert reported their marriage was good at times, and Yolanda could be very "sweet." However, at other times she complained about insignificant things in order to precipitate an argument. He now feels the arguments were intentional so that she had an excuse to "kick" him out, so she could leave with her friends or lovers. Robert stated Yolanda was "always hard to get along with." He denied domestic violence.

Robert stated Yolanda was unfaithful to him during their entire relationship and said he caught her on two occasions having sex with other men. They separated but reconciled when Aniah was born in October 2006. Robert and Yolanda are still married. Yolanda had been married previously and had a son, Gregory Colston, from that marriage. Gregory was 15 years old when Robert and Yolanda married. Robert said he and Gregory had a great relationship and enjoyed spending time together.

Even though he has not had many serious relationships, Robert has fathered five children. His first child, Laquanisha McCoy, is 12 years old. Her mother is Gabrielle Howard. His second child was born to Versaline Addison and is a 9-year-old boy named Lamar. He has an 8-year-old son, Tyrique, born to Sonja White, and a 3-year-old son named Christian born to Crystal Willie in October 2005. His youngest child is 2-year-old Aniah Colston born to Yolanda.

Robert is in good physical health. He stands 5'8" and weights 170 lbs. He reported he has never had surgery, does not have any tattoos, and has never received a blood transfusion. He was treated with Coumadin for a blood clot on his leg due to being assaulted by corrections officers and is currently being treated with an antidepressant. Robert reported he was diagnosed with an ulcer after being taken to the hospital with rectal bleeding in June of 2008. He also reported he was beaten unconscious in May 2008 by corrections officers in Lewiston, Idaho.

Robert stated he does not drink, has never used illegal drugs, and does not use tobacco. He reported that he was in counseling and anger management at the Caddo Career Center with Dr. Cole Flournoy.

Robert denied suicide attempts although he has been transported to a hospital on several occasions during the summer of 2008 for reported attempts.

Robert reported he was beaten unconscious by three correctional officers in Idaho in May 2008. He was transported to the hospital, and it was reported that he had tried to commit suicide. He denied making a suicide attempt and reported the jail was trying to cover for the assault.

In June 2008, he was taken to the hospital again; it was reported he had tried to commit suicide by swallowing razor blades. He stated he was bleeding from his rectum due to an ulcer not a suicide attempt.

He was released from the hospital and returned to the jail only to be returned to the hospital a week later after he claimed he had been tased, maced, and tackled by an officer.

> Robert reported he had become depressed last month and chewed a hole in his arm opposite the left elbow. He was transported to the hospital and received stitches to close the injury.

Robert stated he has had several felony convictions caused by the women he dated. He denied guilt in all of the criminal matters. He was incarcerated for several years for Second Degree Kidnapping. He spent 18 months at Caddo Correctional Center and three years at Caldwell Correctional Center before being released on parole in September 2004.

DOCUMENT REVIEW:

Mr. McCoy's rap sheet shows an arrest in August 1994 for Simple Criminal Damage to Property; the charges were dismissed. He was also arrested in June 1995 for Unauthorized Entry of an Inhabited Dwelling; the charges were Non Prossed.

He was arrested in March 1997 for Driving under Suspension, Simple Criminal Property Damage, and Illegal Carrying of a Weapon when Gabrielle Howard alleged he assaulted her. His rap sheet does not show the outcome of those charges.

Mr. McCoy was arrested in March 1999 for Simple Criminal Damage to Property, Theft, and Driving under Suspension and sentenced to four years of hard labor. His sentence was suspended, and he was placed on supervised probation from May 1999 to November 2000. His rap sheet shows a probation violation in December 1999 on the Simple Criminal Property Damage charge.

Mr. McCoy was arrested in 2001 for Second Degree Kidnapping when Yolanda Bradford alleged he tried to take her from one place to another using a firearm. He

denied he tried to kidnap Yolanda but said he received a four-year sentence. He spent 18 months at Caddo Correctional Center and three years at Caldwell Correctional Center. He reported he was a GED tutor at Caldwell. He was released on parole in September 2004.

His final arrest occurred on May 9, 2008, in Lewiston, Idaho, for Giving False Information to Police and Possession of a Concealed Weapon. He was extradited to Louisiana and charged with the May 5, 2008, killings of Christina Colston, Willie Ray Young, and Gregory Colston in Bossier City.

Three deputies employed by the Nez Perce County Sheriff filed incident reports on May 12, 2008, regarding a suicide attempt by Mr. McCoy. The deputies reported finding Mr. McCoy sitting in a slumped position on his cell floor unconscious and unresponsive. Mr. McCoy had a sheet tied around his neck and the cell bars and was sitting in a position where all his body weight was on the sheet around his neck. Deputies performed CPR and called for emergency transport of Mr. McCoy to a nearby hospital. He was treated in the emergency room of St. Joseph Regional Medical Center where he became combative and irritable. A CT scan, EKG, and lab tests were performed. Mr. McCoy claimed he did not remember anything that happened and denied being suicidal. Instead, he posited there were other people in the cell and somebody else could have done this to him. Mr. McCoy denied neck pain or headache, and all tests were negative. He was discharged, returned to the jail, and placed in closed custody.

Mr. McCoy was extradited to Bossier Parish on May 14, 2008. He was immediately placed on suicide watch at

the Bossier Parish Maximum Security jail. During his assessment the following day, Mr. McCoy defied any history of suicidal or homicidal thoughts, but he was left on suicide watch as a precaution. On May 16, 2008, the mental health unit saw Mr. McCoy. He reported he had been "set up by his wife" and repeatedly stated he was "not a violent person." He stated he did not want or need mental health treatment and said, "I am a stable minded person." He reported he had "no memory" of the incident in Lewiston and stated he was lying on his bunk, someone came in, and he "woke up in a hospital." He was seen by Dr. Anita Flye on May 23, 2008; he continued to deny every having thoughts of self-harm. Dr. Flye requested discontinuation of suicide watch.

Around 2:30 a.m., June 8, 2008, deputies at the Bossier Maximum Security Facility noticed Mr. McCoy via security camera squatting in the center of the room in a pool of blood. Upon entering his cell they noticed cuts to both his right and left arm, blood in his rectal area, and feces mixed with the blood. First aid was performed, and Mr. McCoy was transported to LSUHSC. After Mr. McCoy left with EMS, deputies searched the cell and took photographs. The officers found no blood on the toilet. The majority of the blood was located on the floor and bedding. They also found bits of razor blades in the blood on the floor. During cleaning of C101, inmates found what appeared to be a broken razor blade in blood. Photos were taken.

Mr. McCoy was treated in the emergency room of LSUHSC where the cuts to his arms were sutured. X-rays taken at the time showed no evidence of a foreign body. Mr. McCoy denied cutting himself and states the laceration to his left arm occurred while working out and hitting his arm on some weights. He

does not, know how the laceration to his right arm occurred. He denied any ingestion or recent injury of any kind. He was admitted to the hospital where more tests were performed to locate the cause of the rectal bleeding. A scan of the abdomen and pelvis showed two benign hepatic hemangioma and a right inguinal hernia but no bowel obstruction, or sign of bleeding. The results of all endoscopy revealed a small pyloric ulcer but no obvious bleeding or erosion near a blood vessel. A colonoscopy indicated no lesions or sign of blood. He was discharged on June 12, 2008, and returned to the Bossier Maximum Security Facility.

Mr. McCoy was returned to LSUHSC on June 19, 2008, due to swelling and pain in his right thigh. He told hospital staff he had been attacked by guards at the jail. He was discharged on June 24, 2008, after being treated for edema, deep venous thrombosis secondary to catheter placement during his last hospitalization.

A July 21, 2008, incident report noted Mr. McCoy had complained to the medical unit. He became nauseated and vomited a large amount of what appeared to be toilet paper.

On July 29, 2008, Mr. McCoy was found unresponsive in his cell. The deputies observed a large amount of blood coming from Mr. McCoy's right arm. They called EMS and applied pressure to wound. He was placed in restraints and transported to LSUHSC. Upon entering the ER, Mr. McCoy was combative; he was biting and spitting at ER staff. The attending doctor decided to place Mr. McCoy on a vent for staff and inmate safety. Mr. McCoy was admitted to the hospital and treated for a self-inflicted bite wound to his right arm. The hospital note indicated, "The patient tried to gnaw off his arm. He was transferred to the surgical intensive care

unit where the wound was cleaned and dressed." He was discharged on July 31, 2008.

Events preceding the Recent Charges:
Robert and Yolanda separated in March 2008, and Yolanda moved back into an apartment on Walnut St., that Robert said, is owned by her ex-boyfriend, Howard. After their separation, Robert caught Yolanda in bed with Tony Green. He claimed he had been calling her on her cell phone and did not get an answer. He went to the house to check on her and noticed the grass needed to be mowed. He went up on the porch to get the lawnmower, and when he walked past her bedroom window, he heard moaning. He opened the window slide next to the air conditioner window unit and pulled back the curtain. Tony Green pulled a gun on Robert. Robert said he left and went to his home, as he did not want an altercation. Later that night, the police contacted Robert and told him Yolanda had filed a complaint and said he had held a knife to her throat. The next night, Robert was awakened by a hard blow to his head and found two men in his bedroom with guns to his head. Robert recognized one of the men as Tony Green. The men demanded his money and keys to his car. He gave them $1500.00 and the keys. They ordered him to the floor and took off in his car. Robert said he did not call 911 or file a police report because there was a warrant out for his arrest due to Yolanda's call the day before. Robert said he contacted an attorney to file for divorce and was advised to get money for a retainer and money for his bond. Instead, Robert decided to go visit his brother Stephen in California.

After a week in Oakland, Robert flew from Oakland to Houston. He spent Friday and Saturday night at the Red Roof Inn and used his credit card to pay for his room. On Sunday a friend, Renee, came to get him in

Houston and took him to Dallas. Robert spent Sunday and Monday nights in Dallas. On Tuesday, he met up with his friend, Robert Evans. He rode with Robert Evans back to California. Mr. Evans developed problems with his truck and introduced Robert to another driver, Mr. Dean, who was headed to Washington. He rode to Spokane, Washington with Mr. Dean. During a stop in Spokane, Robert said he was sleeping in the tractor when Tony Green showed up in a truck with another man from Shreveport. Robert said he recognized Tony's voice. When Tony said he was thirsty, Mr. Dean invited him to help himself to a drink behind the seat. Tony "fumbled" behind the seat for a long time and when he finished Robert said he had a "smirk" on his face. Robert contacted his brother, Stephen, to let him know he was in Washington. Stephen did not have a car or a way to get Robert, so Robert rode with Mr. Dean to Idaho. When they reached the destination in Idaho, police surrounded the truck and arrested Robert.

Robert said he had not talked to anyone in Shreveport while he was gone and did not know Yolanda's family had been killed. During the arrest, the police found a handgun under the seat of the truck. Robert denied he was the owner of the gun and tried to explain that Tony Green must have placed it there.

In addition, Robert said two weeks before his arrest he learned that Yolanda had been sleeping with her stepfather, Willie Ray Young. He claimed he discovered this information through a friend who had seen them together in public and followed them to a hotel room. Robert said he never confronted Yolanda with this information.

PSYCHOLOGICAL TESTING:

Mr. McCoy earned a Full Scale IQ score of 89, which falls at the 23rd percentile of Measured Intelligence within the Low Average range. His Verbal IQ is measured at 95 and his Performance IQ at 83. His verbal score falls at the 37th percentile in the Average range, and his performance score falls at the 13th percentile in the Low Average range. Mr. McCoy did well on the Mini Mental Status Examination indicating adequate orientation, attention, concentration, memory, and comprehension skills.

Mr. McCoy performed well on several measures of malingering suggesting that he put good effort into his test performance. Further, he earned a score of 81 on the Georgia Court Competency Test when a score of 70 is required for competency. He earned a score of 34 on a Sentence Completion test having to do with competency, when a score of 20 is required for competency.

Mr. McCoy completed the MMPI-2 in a manner that suggested that he was making every effort to present himself in an improbably favorable light. This may result from a lack of awareness or a lack of insight, but also suggests a "faking good" response set. The data are consistent with people who are defensive and reluctant to admit to common problems experienced by everyone.

Two of the 10 clinical scales of the MMPI-2 are elevated beyond significance. These elevations generally reflect unresolved hostility and anger, as well as a general dissatisfaction with one's life. Similarly scoring people are seen as having adjusted to a level of chronic depression in which worry and obsession are prominent features.

Similarly scoring people tend to be seen as dependent, passive dependent, and/or narcissistic. Interpersonal problems are common for them. These types of people tend to make excessive demands for attention and sympathy on others while paradoxically resenting people who make normal demands on them. These types of people are prone to occasional violent outbursts.

CASE CONCEPTUALIZATION:

Mr. McCoy's presentation of himself and his history is somewhat at odds with what is reported about him from third party sources. Discrepancies regarding the events preceding the deaths of Colston, Young, and Colston, regarding Mr. McCoy's suicide attempts, and regarding his past history of violence, lend themselves to several questions: 1) Is Mr. McCoy suffering from Dissociative Amnesia, which renders him unable to recall important information such as the repeated suicide attempts; 2) Is Mr. McCoy in a state of denial, which has distorted his perception of reality by keeping the truth regarding the killings and the suicide attempts hidden from his consciousness; 3) Is Mr. McCoy psychotic and out of touch with reality such that what he reports is delusional; or 4) Is Mr. McCoy intentionally fabricating alternatives to the truth when the truth is unfavorable or painful?

A diagnosis of Dissociative Amnesia is usually associated with events considered traumatic or stressful and, therefore, could be appropriate for his loss of memory for the suicide attempts. However, Dissociative Amnesia does not explain Mr. McCoy's denial of violence against women in the face of a prior conviction or his denial of factual evidence in the killings of the Colston family. Dissociative Disorders are often associated with severe physical and sexual abuse that he does not report.

The use of the defense mechanism of denial is a plausible explanation for inconsistencies in that Mr. McCoy may have unconsciously rearranged his perception of external reality in order to eliminate the need to cope with the truth of what he might have done. Contrary to what is seen in most who use the defense mechanism of denial are Mr. McCoy's clear and well thought out explanations that counter each discrepancy with which he is confronted.

Psychosis would be an explanation if Mr. McCoy presented with typical hallucinations and delusions frequently seen in patients with psychosis arid with the disorganized and troubled thinking that so often plagues such patients. To the contrary, Mr. McCoy presents with none of the positive signs of psychosis or the negative symptoms often seen in the psychotic illnesses. Rather, Mr. McCoy is oriented in his presentation, clear thinking, and gives a thorough and clear history of his family and himself.

A claim of amnesia is most common in a context in which there is a potential for secondary gain and/or a potential to avoid an undesired consequence. In Mr. McCoy's situation, claiming amnesia could be viewed as an avenue for secondary gain in such things as trips out of the jail to the hospital, increased personal attention, sympathy, concern, care, etc. Claiming amnesia could aid in the avoidance of undesired consequences including avoiding negative attitudes toward him by others and/or a reduction in the charges against him.

COMPETENCY ISSUES:

Mr. McCoy demonstrated no active mental states that would interfere with his rational understanding of the proceedings or his ability to assist toward his defense. Essential to the issue of competency to stand trial is

whether or not a mental disease or defect is present and interfering with the defendant's ability to understand the charges against him, his ability to properly assist in his own defense, and the ability to understand the nature and consequences of the proceedings against him. I find no evidence that Mr. McCoy is experiencing the active phase of a mental disorder that would render him unable to understand the nature and consequences of the proceedings against him at this time or unable to assist his counsel in his defense.

RESPONSIBILITY ISSUES:

Mr. McCoy's mental status throughout the evaluation does not suggest the presence of a mental illness that would have interfered with his criminal responsibility at the time of the offense. Investigative documents make no mention of bizarre behavior at the time of the alleged offense. The defendant's sequence of behaviors appears to have been organized, calculated, and deliberate.

Therefore, it is my opinion that Mr. McCoy was not suffering from the symptoms of a mental disorder or disease that was causally related to the alleged offense that would have resulted in his inability to appreciate the nature and quality of the wrongfulness of his behaviors.

Hopefully, the above will be helpful to you in proceeding with Mr. McCoy's case. Should you have questions of me, please do not hesitate to call.

RESPECTFULLY SUBMITTED:

/s/ Mark P. Vigen
Mark P. Vigen

Affadavit
Notice of Intent to Offer Alibi!!!
;Cr. P. Art. 727; Notice of Alibi!!!

Upon the date of May 5, 2008; I plaintiff/defendant was in the presence of Ms. [?]eena Miles. Ms. Miles is a friend of the family through personal relations. Ms. Miles currently lives in Dallas Texas. Ms. Miles is an nurseing assistant in the medical field of medicine and patient health services. The address of Ms. Myles at this moment is not known by defendant; because of only two visits; but noted information is being obtained! Ms. Miles picked defendant up in Houston on May 4, 2008; and defendant stayed at residence in Dallas Texas owned by Ms. Miles, until transported to truck-stop in Dallas Texas on the 6th of May of 2008, to meet fellow truck driveing Robert Evans. Ms. Miles upon verification of said facts will also validate defendants reason and complaints an attempt on his life and communication of facts to family and Deputy Virgil Robinson etc; of the Caddo Parish Sheriff Office in La!!!

Pro Se- Robert McCoy II !!!

Affadavit
Notice of Intent to Offer Alibi!!!
;Cr. P. Art. 727; Notice of Alibi!!!

Before and upon the date of May 5, 2008, I plaintiff/defendant brings before you Mr. Carlos McCoy. Mr. McCoy is the brother of the accused defendant. Mr. McCoy resides in Shreveport, LA, at address 7323 Altos Loop, Shreveport, La, att. Mr. McCoy was informed with family of violations and illegal conduct on accused by B.P.D., and wifes attempts to get accused prosecuted. Mr. McCoy was also informed on Lt. Ross & Detective Humphries acknowledgement of help, but, it was total deception. Mr. McCoy was informed also in April of 2008, but accused of second attempt on his life by B.P.D., and was in total knowledge of accused leaving the state of Louisiana weeks before accused crime and can validate accused where-abouts through personal relations with accused out of state; by older brother, relatives at [illegible] of state & in state and documents to validate being completely out of state before-while-and after accused incident by the state of Louisiana.

Pro Se- Robert McCoy II !!!

Affadavit
Notice of Intent to Offer Alibi!!!
;Cr. P. Art. 727; Notice of Alibi!!!

Before and upon the date of May 5, 2008, I plaintiff/defendant brings before you Mrs. Mary McCoy. Mrs. McCoy is the mother of the accused defendant. Mrs. McCoy resides in Shreveport, La, at address 7323 Altus Loop Shreveport, La. Mrs. McCoy was informed with family of violations and illegal conduct on accused by B.P.L., and wifes attempts to get accused prosecuted. Mrs. McCoy was also informed in April of 2008, by accused of second attemp on his life by B.P.D, and was in total knowledge of accused leaving the state of Louisiana weeks before accused crime and can validate accused where-abouts through personal relations with accused by phone out of state, by older brother out of state, relatives out of state & in state and documents to validate from Money Gram being completely out of state before-while-and-after incident accused of by the state of Louisiana.

Pro Se- Robert McCoy II !!!

Affadavit
Notice of Intent to Offer Alibi!!!
;Cr. P. Art. 727; Notice of Alibi!!!

Before and upon the date of May 5, 2008, I plaintiff/defendant brings before you Mr. Robert L. McCoy SR. Mr. McCoy is the father of the accused defendant. Mr. McCoy resides in Shreveport, La, at address 7323 Altus Loop Shreveport, La. Mr. McCoy, family and friends was informed by accused on several violations and illegal conduct while traffic stops by B.P.D. Mr. McCoy was informed of attempt by accused wife actions to bring prosecution on plaintiff etc. Mr. McCoy was also informed in April of 2008, by accused of second attempt on his life by B.P.D, and was in total knowledge of accused leaving the state of Louisiana weeks before accused crime and can validate accused where-abouts through personal relations with accused out of state, his older son out of state; relatives out of state and documents to validate being completely out of state before-while-and-after accused incident by the state of Louisiana.

Pro Se- Robert McCoy II !!!

Affadavit
Notice of Intent to Offer Alibi!!!
;Cr. P. Art. 727; Notice of Alibi!!!

Before and upon the date of May 5, 2008, I plaintiff/defendant was constantly in direct communication and correspondence with Caddo Parish Sheriff Deputy Mr. Virgil Roberson. Mr. Roberson is very familiar with plaintiff through relation! Mr. Roberson resides in Shreveport, La, current address isn't known at present time, but, Mr. Roberson can be located or contacted at the Caddo Parish Courthouse or Caddo Correctional Center in Shreveport, La. Mr. Roberson is an reliable witnesses for the defense on the ground of (1) familiarity; (2) oath of service & protect and (3) loyalty to God & Justice!!! Deputy Robinson was informed of all allegations; before, while, and during [illegible] because defendant was accused of said crime. Deputy Roberson can validate & will confirm under the penalty of perjury defendants factual where-abouts, attempts on his life, and verbal communication of lodgeing before said accused incident of defendant by the state.

Pro Se- Robert McCoy II !!!

Introduction of Documents

I would like to have these documents added and recorded, therefore, be accepted as admissible evidence and recorded into the record on behalf of the defense. (under ABA standard for Criminal Justice 4-38) states, "Defense Counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information. Upon asking a second-time for the entire "Discovery Information" in [illegible] the prosecution intends to present at trial; counsel hasn't met said requests! (Rule 1.4, ABA Model Rules of Progressional Conduct). YOUR duty as counsel by law is to respond – reasonably – promptly to a defendants' request for information! 1st Amendment Right, "Freedom of Information Act"! By Law in (Georgia v. Randolph, U.S. Sup.Ct. 2006), If anyone share a space or residence etc; If someone agrees to a search & you refuse consent; as I did; & If you are personally present when permission is asked; your refusal means that evidence cannot be used against you; even if the subject of evidence is incriminating or of incrimination. Enclosed is Exhibit AB; A valid Affidavit for the defense on corruption & unlawful conduc on/by-B.P.D., officer Richard McGee's actions of statutory rape & physical knowledge of the law in which he pregnated Ms. Taylor a 14 year old in 2008!! Minors are legally incapable of consenting to sexual intercourse. "F.O. Logged"!!!

Pro-se-plaintiff
Robert L. McCoy II 1-6-10...

Affadavit

I Demarcus Nelson is writing this affidavit on the behalf of the defense of Robert MccycyII. On and about 2008 of October, I Demarcus Nelson am a witness to the under age cruel sexual encounter of Richard mcgee and my cousin Demetria Taylor. Richard mcgee was fully aware of my cousin age of 14 years old. Richard mcgee pregnated my cousin without her consent and authority of her parents. While being currently a task force officer for B.P.D. And knowing the law he willfully committed carnal knowledge of a juvenile, while holding a governmental position as a respected peace officer. I declare under the penalty of perjury that all information that I have permitted is correct to the best of my knowledge. Ive written this affidavit by free will, and not under any duress.

/s/ Demarcus Nelson

1-4-2010

STATE OF LOUSIANA	26th Judicial District
-vs-	Court Docket #
Robert L. McCoyII	163572, 164646

MOTION For Speedy Trial or
Dismissal of Prosecution

Now into court comes, Robert L. McCoyII defendant, in the foregoing motion and provides to the court as follows to-wit;

I

The Defendant was placed on notice by custodians in the Louisiana Department of Correction, that a warrant/detainer was lodged against him by the 26th Judicial District Court. The alleged charge is 3 counts of 1st Degree-Murder & Aggravated Battery, in violation of Louisiana Revised Statute.

II

The Defendant has a clear right to a speedy disposition of this matter, and jurisprudence holds that, if these rights are not afforded to the defendant, then the warrant/detainer must be quashed. Strunk v. U.S., 93 S.Ct. 2260, 37 L.Ed.2d. 56 (1973). In Strunk, supra the United States Supreme Court held that the denial of a speedy trial requires reversal of the conviction and the dismissal of the charge.

III

In Miller v. Geoft, 337 So.2d 1191 (La. 1976), the Louisiana Supreme Court held that the right to a speedy trial is stressed and is noted as a guaranteed one, thus should be fully acknowledged.

IV

Furthermore, in accordance with the Louisiana Constitution of 1974, Article 1, Section 16, every person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy public and impartial trial in the Parish where the offense or element of the offense occurred.

WHEREFORE, the defendant prays that based on these facts, the time that has expired, that the warrant/detainer against the defendant be resolved by affording defendant a fast and speedy trial. Or in the alternative the warrant/detainer lodged against the defendant be removed according to the above jurisprudence.

Respectfully submitted:

/s/ Robert L. McCoy II

3rd Filing or Motion
1-10-2010

D.O.C. #55947
POD 0-102

Bossier Maximum Security Facility
2985 Old Plain Dealing Rd.
Plain Dealing, Louisiana 71064

For the Records
Response to Prosecutors prior
Motion to Quash defendants affidavits
etc, ... Burden met in admissible facts etc.

Upon the introduction into Law of the "Federal Basic Evidence Rule", (Federal Rule of Evidence 402) is the basic building block of evidence rules. For evidence to be relevant, same logical connection must exist between the evidence and the factual issue it is offered to prove or disprove. "(A brick is not a wall"). The main Limitation of the relevance Rule is that the connection must be based on reason and Logic rather than on bias and emotion. Said affidavits and alibis were entered under 28 U.S.C. 17416, An Federal [illegible] declination under penalty of perjury that may be substituted for an affidavit. The connection of said information enclosed in said affidavits etc, is relevant and factually [illegible] that supports the admissions and unseen context of defendants case. The plaintiff/defendant has sufficient evidence in documents to identify the person or persons, their acts/actions including has led to this present position in-which plaintiff/defendant is now included in!!! Plaintiff has sufficient evidence to show a violation of clearly established Law, and thus he has met the burden to identify and present supporting facts on the belief of the defense. Thus makes said information – Affidavits, alibis etc, admissible by the ("Federal Rule of Evidence 402") and by ("Federal Rule of Evidence 403") which balance the evidence to assure that the evidence in the case against the risk of unfair prejudice!!! It is very important that we view the "Deliberate Indifference" Clause"... (City of Canton v. Harris, 489 U.S. 378 (1989). which holds a higher form of negligence. "Conduct that shows the conscience". Judicial review, defined as "the power of

any court to hold unconstitutional and [illegible] unenforceable any Law, any official action based on the Law, or any other action by a public official that it deem is to be in conflict with the Constitution. "Rule of Law", holds that no person is above the Law, that every person, from the most powerful, public official down to the least powerful individual, is subject to the Law and can be held accountable in the courts of Law for what he or she does. "A government of Laws and not of men." Fact is, that no person in this country, not even one wearing a badge of authority, is above the Law! Plaintiff can prove all set of facts to support his claim, and the claim has arguable basis in Law or fact, and there is a chance of success. Also a plaintiff is required to support his "claim with sufficient precision and actual specificity to raise a genuine issue as to the illegality of defendants' conduct etc, at the time of alleged acts". Schultea v. Wood, 47 F.3d 1407, 1434 (5th Cir. 1995). Under § 1983, a plaintiff must identify defendants that were either personally involved in a constitutional violation or whose acts were causally connected to the constitutional violation alleged. Woods v. Edwards, 51 F.3d 577, 583 (5th Cir 1995). Subjective conclusory facts are sufficient to overcome prosecutors misguided attempt to repeat the omission of exculpatory evidence, while including inculpatory evidence, inclusion of debatably fabricated evidence, failure to follow obvious and apparent leads which implicated other individuals, and the use of questionable forensic conclusions, identification of plaintiff by eye-witneses, etc, that the involved prosecutor/26th Judicial Court etc, were acting deliberately toward the specific end result prosecution of plaintiff without regard to the learning signs, affidavits, witnesses, alibis along the way that their end result is/was unjust and not supported by the facts of their investigation. In violation of 4th, 5th, 6th, 8th and

14th Amendments of the U.S. Constitution! Amendment XIV; All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any Law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of Law; nor deny to any person within its jurisdiction the equal protection of the Laws. "The right to due process"! "The right to equal protection"!

Pro-se-plaintiff

Robert L. McCoy II

1-12-2010...

"In God we Trust"!!!

Introduction of Documented
Federal and State Law Status
on behalf of the defense.

I would like to have three documents added and recorded therefore by accepted as admissible evidence and recorded into the record. The Rules of procedure in the charter of this tribunal state specifically that documents to be used as evidence by either party must be submitted to the court in advance of their presentation as evidence. As such documents are essential to the testimony of the principal defendant for his defense.

I would also like to invoke the U.S. Supreme Court case Haynes vs- Kenner, to invoke that I'm not a Lawyer, nor do I claim to be!!!

In Kennedy v. Los Angeles Police Dept., 887 F.2d 920 [(9th Cir. 1989]. Unlike ordinary body searches, therefore, strip and body cavity searches are not allowed after arrest unless "Reasonable suspicion" justifies the search.

The area within a "Persons' Immediate Control," (Chimel v. California), 395 U.S. 752 (1969). The Chimel Rule holds that a warrantless search – next – incident to arrest is valid "iF" Limited to the "Area of immediate control", meaning the area From which the person might be able to obtain a weapon or destroy evidence. Refered to as the ("grabbable area"). Limits the area to the arrested person's "wingspan" – the area covered by the spread of the person's arm and hands. "Consent" to search must be "Free" & "Voluntary", not obtained by the use of force, duress, or coercion-.. "Threatened him with going to jail. "Said, I'm going to search your truck, and look in it for anything illegal." "Involuntary consent"! – misrepresentation & decep-

tion saying, "We have a warrant to search, when none exists. See, (Bumper v. North Carolina, 391 U.S. 543 [1968]. "Consent" can be rebuked – even in the course of search, by whom gives consentor by whom anybody else who possesses authority to do so.

Impermissibly suggestive Identification Procedure (U.S. v. Wade, 388 U.S. 218 (167). Ned v. Biggers, 409 U.S. 188 (1972). Can't Lead to an identity of the accused.

Involuntary Compressions not valid because of –

1. Chambers v. Florida, 309 U.S. 227 (1940) coercion.
2. Spano v. New York, 360 U.S. 31 (1959) deception.
3. Rogers v. Richmond, 365 U.S. 534 (1961).
4. Escobedo v. Illinois, 378 U.S. 748 (1964), denied counsel next –

The right of people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated. The third Advance Amendment upholds such – rightful guarantees by the U.S. Constitution and the Bill of Rights.

In the State Constitution, Federal or State Laws, case Laws, and court Rules. These other sources may cause litigations from on jurisdiction, but, they can only give rights to a suspect by limiting the actions of the police or the counts, they cannot deprive a suspect of any right given by the Bill of Rights. In case of a conflict between other sources of rights and the Bill of Rights, the Latter prevails!

Only Repeated for Factual Security
Basic Evidence Rule

(Federal Rule of Evidence 402) is the basic building block of evidence Rules. For evidence to be relevant, some Logical connection must exist between the evidence and the factual issue it is offered to prove or dis-

prove. "(A brick is not a wall)". The main Limitation of the Relevance Rule is that the connection muse be based on Reason and Logic Rather than on bias and emotion.

(Federal Rule of Evidence 403) Balance the evidence next – to assure that the evidence in the case against the risk of unfair prejudice. In Indianapolis et al. v. Edward, et al. 531 U.S. 32 [2000]. The doctrine of judicial Review has significant implications in Law-enforcement. It means that Laws passed by Legislative bodies can and will be reviewed by the courts in – proper case and will be declared unenforceable If found to the against the constitution. For – individual Law enforcement Officers, it means that whatever they do can be challenged in court; and, if held to have violated individual Constitutional Rights, could Result in the imposition by the Court of Civil or Criminal sanctions. The exclusionary Rule provides that any evidence obtained by the government in violation of the 4th Amendment guarantee against unreasonable search and seizure is not admissible in a Criminal prosecution to prove guilt. Evidence obtained in violation of any of the other constitutional rights is also excludable in a criminal trial.

Force disclosure of papers "illegible" to evidence, etc; Inadmissible

(Boyd v. United States, 116 U.S. 616 [1886]

"Evidence Illegally Obtained by Federal OFFICERS / excluded in criminal prosecution." (Weeks v. United Sates – next – 232 U.S. 383 [1947]. Whitley v. Albers, 475 U.S. 312 [1986]

Guarantee of the Constitution.

The efforts of the courts and their official to bring the guilty to punishment, praiseworthy as they are, are not to the aided by the sacrifice if these great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental Law of the Land ... To sanction such proceedings would be to affirm by judicial decision or manifest neglect, if not open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action. Spears v. McCotter, 776 F.2d 179 [5th Cir. 1985] From 1914 to 1960, Federal Courts allowed evidence admitted evidence of a Federal crime if the evidence had been illegally obtained by state officials/Officers, as long as it had not been obtained by or in connivance with Federal Officers. This dubious practice was known as the "silver platter doctrine", a procedure that permitted Federal Courts to admit evidence illegally seized by the State Law-enforcement Officers and handed over to Federal Officers for us in Federal cases. Under this doctrine, such evidence was admissible because the illegal act was not committed by Federal Officers. In 1960, the next - court put an end to this questionable practice by holding that the Fourth Amendment prohibits & prohibited the use of illegally obtained evidence in Federal prosecutions whether obtained by Federal or by State officers there by laying to rest the silver platter doctrine, (Elkins v. United States, 364 U.S. 206 [1960]. Can't put illegally obtained evidence on accused when he neither owned, possessed, concealed, not on his person, nor seen with, or, taken off of accused! In like manner, putting the prosecutor in the place of the Federal Officers and the detectives etc, in like place of state law enforcement officials; the detectives of the etc, cannot

submitt illegally obtained evidence in state prosecutions, this dubious practice is strictly illegal and is an open defiance to the prohibitions of the constitution that intends to protect people against such unauthorized actions. No deoxyribonucleic acid, the chemical that carries a person's genetic information, known in some circles as genetic fingerprinting; DNA may be recovered from a variety of sources of different individuals, from semen, blood, hair, skin, sweat and saliva. "None found or located anywhere of accused"! Also see, (Rochin v. California, 342 U.S. 165 [1952] (Mapp v. Ohio, 467 U.S. 643 (1961). Fourth Amendment next – Right required state courts to exclude evidence obtained by unlawful searches and seizures. In both federal and state courts, the basis procedure for excluding evidence on a claim of illegal search and seizure is a pre-trial motion to suppress the evidence. In which counsel, per my wishes, request & submission of affidavit refused to file, etc.. Said refusals are violations of accused Constitutional rights during pre-trial proceedings, etc...Said motion to suppress & Fast and speedy trial requests was made filed/ was made by accused, but, denied by counsels outright defiance of accused rights and it is an error of the court to protect and support such defiance. The exclusionary rule may be used only by the person whose Fourth Amendment Rights have been violated, meaning the person whose reasonable expectation of privacy was breached by the police. "Illegally seized" Evidence includes contraband, "Fruits of the crime" (For example stolen goods), instruments of crime (such as burgular tools etc) or "Mere evidence" (shoe, shirt, or the like connecting a person to the crime), which is seize illegally, may not be admitted at a trial to show the defendants guilt.

"Fruit of the poisonous Tree", doctrine states that once the primary evidence ("the tree") is shown to have been unlawfully obtained, seizure of confession from coercion, threats, force, etc, and secondary or derivative next – evidence ("the Fruit") derived from it is also inadmissible (Silverthorne Lumber Co. v. United States, 251 U.S. 385 [1920]. This rule is based on the principle that evidence illegally obtained should not be used to gain other evidence; because the original illegally obtained evidence "taunts" all evidence subsequently obtained. The tainted secondary evidence (some courts prefer to call it "derivative evidence" or "secondary evidence") can take various forms.

Example 1. The police conduct an illegal search of a house and find a map that shows the location of the stolen goods. Using the map, the police recover the goods in an abandoned warehouse. Both the map and the goods are not admissible as evidence, but for different reasons. The map is not admissible, because it is illegally seized evidence, the goods (physical evidence are not admissible either because they are "Fruit of the Poisonous tree"!

Example 2. The police enter a suspect house without probable cause or consent and discover the suspects diary, and a entry of which contains the details of murder and the location of the murder weapon. The police go to the location and find the weapon. The diary is not admissible as evidence in court because it is illegally seized evidence, the murder weapon is not admissible because it is the "Fruit of the poisonous tree." "We must abide by the Constitution, Bill of Rights & the laws of the land; no one is above the law!" I move for, "Dismissal of Charges"!!! Pro-Se Plaintiff Robert McCoy 7-17-2017

Cynthia J. Johnston
Clerk of Court
26th Judicial Court

Robert McCoy II Doc # 163572, 164646
v.
State of Louisiana Judge Cox

Affidavit
Constitutional Rights
The "One Free Bit" Rule

In U.S. Supreme Court Case (Haynes -vs- Kenner) I invoke that I'm not a lawyer, nor do I claim to be. The Constructional Right to compulsory process to obtain witnesses; the Sixth Amendment expressly provides that the accused in a criminal prosecution shall have the right to compulsory process for obtaining witnesses in his or her favor. The right to obtain witnesses includes 1. The power to require the appearance of witnesses, and 2. The right to present a defense, which in turn includes the defendants right to present his or her own witnesses and his or her own version of the facts. The essence of this principle is that the defendant is given the same right as the prosecutor to present witnesses in state & Federal proceedings. next – If the trial court excludes evidence crucial to the defense and bearing substantial assurances of the trustworthiness, this violates the right to present a defense even when the evidence is technically not admissible under local rule of evidence (Chambers v Mississippi, 410 U.S. 284 (1973).

Violation of Court
No Response to Filed Motions.

On 11-4-09, Defendant filed numerous motions of specificity for defense only 3 was responded too. Ignored requires for "Gag Order". On 11-8-09, Defendant re-

quest to the court under Article 439 C.CR.P. Subpoena of witnesses to appear before grand jury & Article C.CR.P. 439.1- Witnesses; authority to compel testimony & evidence in accordance with subsection B "illegible " – Article 439.1(A)(B)(C) in which request of attorney General & District Attorney together to order evidence incrimination testimony. Also under R.S. 15:471, Grand jury and district attorney to be competent witness both for state and for defense in any prosecution for perjury of false swearing, alleged to have next – been committed before the grand jury, and authorized by La. Code of Evidence Article 606; to said date of 1-24-10, - has been ignored and denied by the court. To verify upon what evidence/factual/any indictment was found, or that it was without evidence. No Response! On 11-11-09 According to Article C. CR.P. 739 Indigent defendant request for additional subpoena's, A sworn application was issued to the court for additional witnesses alleging that the testimony of additional witnesses is relevant and material and not cumulative and that the defendant cannot safely go to trial without it, was ignored to said date of 1-24-10 – and denied by court, with no response! On 11-18-09 According to Article C. CR.P. 703 motion to suppress Evidence & may moved on any constitutional ground to suppress. According to C.CR.P. Article 701, motion for a speedy trial was requested in accordance with affidavit to support defendants right in June of 2008, on May 21, 2008, and above date; but counsel, Refused to submit request etc; by denying defendant next – constitutional guarantees and judge accompanied said "miscarriage of justice;" even up on validation through clerks office motions/documents/affidavits by defendant and refused defendants request for a "Contradictory hearing" within 30 days of injustice etc; saying "I should have filed said motion within 15 days after arraignment," when

defendant met regulations in advance; but, counsel was "deliberately indifference" in unproper legal representation validating, "Actual Ineffectiveness of counsel" valid in (Wiggins v. Smith), 539 U.S. 510, 534-35, 128 S.Ct 2527, 2542-43, 1561, 2d. 471, 493-94 (2003). In accessing prejudice [in capital case], we reweigh the evidence in aggravation/against the totality of available mitigating evidence.

Constructive Ineffectiveness
The Cronic standard

United Sates v. Cronic, 466 U.S. 648, 658, 1045 S.Ct. 2039, 2046, 80L. Fd. 2d. 657, 667 (1984). Bell v. Cone, 535 U.S. 685, 695-98, 122 S.Ct. 18433, 1850-52, 152 L. Fd. 2d. 914, 927-29 (2002).

1. Defendants facts to statue

If your lawyer represents a government next – lawyer collaborated or had a connection with the prosecution etc; see e.g. (Mickens v. Taylor, 535 U.S. 162, 174-76 122 S.Ct. 1237, 1245-46, 152 L.Fd 2d 291, 306-07 (2002). (Precision facts). Kimmelman v. Morrison, 477 U.S. 365, 384-85, 106 S.Ct. 2574, 2587-88, 91 L.Fd. 2d 305, 325-26. Trial Court refused to rule on defendants motion to suppress evidence because counsel's motion was untimely etc. The defendant none-the-less ultimately obtained a hearing on the merits of the suppression motion by raising a claim that his trial counsel was ineffective for failing to make a timely suppression motion by raising a claim that his trial counsel was ineffective for failing to make a timely suppression motion. Kimmelman v. Morrison, 477, 477 U.S. 365, 106 S. Ct. 2574, 91 L.Fd. 2d. 305(1986).

1) Counsel had a conflict of interest.

2) Counsel failed to investigate and perform certain pretrial functions.

3) Counsel failed to pursue defenses available to defendant. (Moore v. Johnson, 194 F.3d 586, 215-619 (5th Cir. 1999). Finding counsel's error in ignoring and failing to investigate certain evidence led to an unfair trial for defendant.

People v. LaBree, 34, N.Y.2d.257, 259-61, 313 N.E.2d 730, 731-32, 357 N.Y.S. 2d. 412, 413-15 (1974). Finding ineffective assistance based on counsels inadequate investigation and preparation.

4) Cursing defendant out; till today – defendant hasn't received discovery requests on 11-4-09; 12-10-09 etc.

Further Vindication of court.
Federal Constitutional Requirements

Ignored requested motions of Brady Violations, Brady hearing, Brady Material, etc. "Unconstitutional"

1) According to the rule laid down by the U.S. Supreme Court in Brady v. Maryland; a prosecutor may not refuse a request by the defendant for evidence that is favorable to him and is material either to guilt or to punishment. Suppression of such – "exculpatory evidence" (evidence which helps the defendant) even as a mistake is unacceptable under Brady. Any evidence is crucial to proving my innocence must be disclosed as a matter of right. The prosecutors failure to reveals such evidence may have a number of consequences; including a new trial or the striking of evidence by the prosecution.

"impeachment evidence" weak witness testimony, etc.

2) Ignored motion and requested hearing raised on the "Issue of Impermissible Suggestiveness" concering

admissibility of testimony concerning the identification of Assailant by eye-witness and detectives description of 6'1, 160lbs. bright-skinned, investigated by S.P.D. and validated accused doesn't fit description etc, but, accused is incarcerated and changed. Factors of witness reliability is crucial and Identification of testimony should be suppressed. Neil v. Biggers, 409 U.S. 188(1972). State v. Butler, 850 50.2d. 932 (La.Ct.App.2d.Cir.2008). State v. Young, 839 50.2d 186 (La.Ct.App.4thCir.2008). State v. Martin, 595 50.2d 592(La. 1992).

In Accordance to Article 521.

Judge Cox; is biased, prejudiced, or personally interested in the case to such an extent that he would be unable to conduct a fair and impartial trial.

In filing said affidavit, "Lve want a different Judge" (Cal. Civ. Proc. Code § 170.6).

Defendant also move for recusation of Judge and D.A., under Article 671/Grounds for recusations of Judge and D.A.

Quoted: By Attorney Miller and Attorney Gorley, Judge Cox said he's going to stay up all night to make sure that me and my brothers get the death penalty and is denying validated motions guaranteed by the U.S. Constitution to defendant, etc.

Quoted: By Attorney Miller, Attorney Gorley, Carlos and Robert McCoy Sr, D.A., Schulyer, Marvin told by brothers and father, if they testify against me and make false statements under oath, they will go free, but, if they don't, they will get the death penalty for accessory and he can promise they/with me/ will never see the light of day again. My father informed D.A. Marvin, he didn't raise his kids to lie on each other and

we'll see him in trial!!! Also a "conflict of evil" lies with D.A. Schulyer has a personal interest in the case and grand jury proceedings which is in conflict with fair and impartial administration of justice. F.C. has affidavit on file!

Pro-se-plaintiff Robert McCoy

Clerk of Court Office of
26th Judicial District Court

Admissible

Constitutional Rights, Statues
and Valid Laws in Support of Defense

Robert McCoy II 55949 Judge Cox
-v-
State of Louisiana Docket #, 163512, 164646

Memorandum of Law
Notice

Plaintiff invokes that he is not a lawyer; nor do he claim to be under U.S. Supreme Court case

Haynes-vs.-Kenner

1) (a) The "personal knowledge rule" (Federal rule of evidence 602) Requires all witnesses (except expert witnesses) to testify based on first hand information.

-Example- can a person testify that something happened; if they didn't personally observe it with one or more of his/her senses? No!!!

(bb) must have actually seen it – to be true and factual. "Lacks personal knowledge."

"Excited Utterances"

Eyewitness Description of assailent 6'1", 160lbs, bright skinned.

(b) This exception admits into evidence statements made under the stress of excitement of perceiving on unusual event. The notion is that people are unlikely to lie when they describe a sudden and exciting situation and was made immediately afterward. An even has to

be unusual to produce the necessary excitement of the truth.

"Dying Declarations"

"Spartacus McCoys' Testimony:

(c) This exception admits into evidence statements made under a sense of immediately impending death. The theory is that such statements are trustworthy because "people don't want to meet their maker with a lie on their lips.

(d) "Assertions of State of mind:

This exception admits into evidence statements setting forth people's emotions, beliefs, intent, etc. The exception rests in the importance of testimony about mental states in many criminal cases, and people's trustworthiness in describing such matters, for example, why would they lie? In the famous, though grisly, U.S. Supreme-Court case that gave rise to this exception (Hillman v. Mutual Life Insurance, U.S. Sup. Ct.1892).

Attorneys etc, are officers of the court, and must respect the institution of trial no matter what their views of the opposing witnesses are.

"Don't Rock the Boat"

Court-appointed lawyers etc, owe their jobs to the judge who appoint them and some panel attorneys may fear that to take a position that offends a judge is to bite the hand that feed them.

2. Factual Statues.

(a) (Williams v. Superior Court, 53 Cal. Rptr. 2d 832 (1996). The court juror; or if two or more persons conspire for the purpose of impending, hindering, obstructing, or defeating, in any manner, the due course of jus-

tice in any state or territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

(b) Equal Rights under the law § 1981(a).

All person within the jurisdiction of the United States shall have the same right in every state and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kinds, and to no other.

(c) (People v. Arthur, 22 N.Y.2d 325, 329 N.E.2d 537, 539, 292 N.Y.S. 2d. 773, 666(1968, holding – that the issue of whether defendant was wrongly denied the right to counsel during police interrogation could be heard on appeal for the first time, where statements made during the interrogation were used by the prosecution during trial. -Also- (People v. Kinchen, 60 N.Y. 2d 772, 773, 457 N.E. 2d 786, 787, 469 N.Y.S. 2d 680, 681 (198"illegible")

(d) (United States v. Rut Ledge, 900 F.2d 1127, 1130-31 (7th Cir. 1990) – holding the police are allowed to pressure, cajole, conceal facts, actively mislead, and commit minor acts of fraud, but are not allowed to magnify a suspect's fears, ignorance, anxieties, or uncertainties to the point where rational decision become impossible.

(e) (United States v. Hernandez, 203 F.3d. 614, 621 (9th Cir. 2000) – Finding that a denial of a pro-se-request

may be unconstitutional if it was made before jury selection and if the request was not a delay tactic.

- The right to a speedy trial does not start running until you are indicted, you can waive this right, and the court balances the right against other considerations.

3. Amendment 6th of U.S. Constitution.

(a) In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where in the crime shall have been committed, which district shall have been previously ascertained by Law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defense. – Right to access court (Procunier v. Martinez).

(b) (Klopfer v. North Carolina, 386 U.S. 213, 221-22, 87 S.Ct. 988, 99293, 18L. Ed. 2d 1, 7 (1967) Ruling that a state may no postpone prosecution of any case for an unlimited period even though the accused remains free to go wherever he desires.

(c) (United States v. Marion, 404 U.S. 307, 92, S.Ct 455-30 L. Ed. 2d 468 (1971) Ruling that the right to a speedy trial guaranteed by the 6th Amendment does not apply until you have been accused of a crime, which may not occur until indictment.

(d) Federal R. Evidence 803, 804, 807, when out of court statements fall within a category listed in the Federal Rule of Evidence, it is admissible as evidence despite the Confrontation Clause of the 6th Amendment.

(e) (Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct, 1444, 20 L. Ed. 2d. 491(1968) holding defendants charged

with non-pelty criminal offenses have a right to trial by jury.

(f) (Gigloo v. United States, 405 U.S. 150, 154-55, 92 S.Ct. 763, 31 L. Ed. 2d. 104 (1972) holding that the impeachment evidence, including promises that the prosecution makes to key witnesses in exchange for their testimony.

(g) (Irvin v. Dowd, 366 U.S. 717, 724-25, 81 S.Ct. 1639, 1643-44, 6L. Ed.2d. 71, 757-58(1961) holding that failure to grant change of venue, despite build up of prejudice and jury that was not impartial, is unconstitutional.

(h) (Sandstrom v. Montana, 442 U.S. 510, 524, 99 S.Ct. 2450, 2459, 61L. Ed. 2d. 39, 51 (1979) holding that prosecution must prove every element of a crime beyond a reasonable doubt, therefore, trial court may not shift the burden of proof to defendant by instructing jury to presume intent in jury instructions

(i) Usually a judge's qualification are not considered to be a constitutional issue. However, the "Due Process Clause", requires "a fair trial in a fair tribunal", before a judge with no actual bias against the defendant. (Bracy v. Gramley, 520, U.S. 899, 904, 117 S.Ct 1793, 1797, 138 L.Ed.2d. 97, 104 (1997). (Edwards v. Balisok, 520 U.S. 641, 647, 117 S.Ct. 1584, 1588, 137 L.Ed.2d. 906, 914 (1997) when the trial judge is not impartial.

(j) (Murray v. Carrier, 477 U.S. 478, 495096, 106 S.Ct. 2639, 2649, al L.Ed.2d. 397, 413 (1986) holding that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent procedural default will not bar review of claims").

(k) (Eagle v. Isaac, 456 U.S. 107, 135, 102 S.Ct. 1558, 1575-76 71L. Ed. 2d. 783, 805 (1982) stating that in some

cases "cause and prejudice" will include the correction of a fundamentally unfair incarceration.

(l) In/House v. Bell, 547 U.S. 518, 126 S.Ct 2064, 2078, 165, L.Ed. 2d, 1,22 (2006) The Supreme Court determined that A.E.D.P.A.'s higher standard of review does not apply in cases where there is a claim of actual innocence.

(m) (United States v. Agurs, 427 U.S. 97, 110, 96 S.Ct. 2392, ÷2401, 49 L.Ed. 2d 342, 353-54(1976) There are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires all/to be disclosed even without a specific request.

(n) (United States v. Badley, 473 U.S. 667, 675, 105 S.Ct. 3375, 3380, 87 L.Ed.2d. 481, 489-90(1985) holding the prosecutor is required to "disclose evidence favorable to the accused that if suppressed, would deprive the defendant of a fair trial.")

(o) Rights of Defendant.

Criminal defendants have a constitutional right to present a defense. Therefore, a judge cannot forbid a defendant from offering evidence of third-party guilt simply because the judge believes that the prosecutor has presented an exceptionally string case. (Holmes v. South Carolina U.S. Sup. Ct. 2006).

(p) Defense attorneys are ethically bound to zealously represent all clients, the guilty as well as the innocent. (Canon 7, ABA model code of professional Responsibility). A vigorous defense is necessary to protect the innocent and to ensure that the judge and citizens and not the police have the ultimate power to decide who is guilty of a crime. Instead, the Lawyer uses the facts to

put on the best defense possible and leaves the questions of guilt to the judge or jury.

(q) (Wiggins v. Smith, 539 U.S. 510, 534-35, 123 S.Ct. 2527, 2542-43, 156 L.Ed. 471, 493-94(2003) In accessing prejudice [in a capital case] we re-weigh the evidence in aggravation against the totality of available mitigating evidence").

(r) Claim of Legal Insufficiency of Evidence

(People v. Gray, 86 N.Y.2d 10, 19, 652 N.E.2d 919, 921, 629 N.Y.S.2d. 173, 175 (1995) – holding that a claim of legal insufficiency of the evidence must be preserved for review as a "question of law," but, noting that an intermediate appellate court may decide to review such a claim "in the interest of justice" even if it was not preserved.

(s) Weight of Evidence

(People v. Bleakley, 69 N.Y.2d 490, 493, 508 N.E.2d. 672, 674, 515 N.Y.S. 2d. 761, 762 (1987) describing "weight of evidence" analysis.

(t) (Faretta v. California, 422. Ed. 562, 580-81 (1975) holding that forcing a literate, competent, and understanding defendant to be represented by counsel violated the defendants' 6th and 14th Amendment rights.

(u) (Tumey v. Ohio, 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71L.Ed. 749, 754 (1927) holding that trial under a judge with a strong personal interest in the case violated defendant's 14th Amendment rights).

Violations of the U.S. Constitution presents issues of Federal Law. See U.S.C. § 1331/2006).

(v) N.Y.Crim. Proc. Law § 470 40(2)(3)(McKinney 1994 & Supp. 2006) Rules controlling what action the court must take.

(w) "Identity at issue at trial" means you/I, that you or your attorney claimed that you did not commit the crime you were/are on trial for. See e.g. Ark. Code Ann § 16-112-201 (Michie 1987 § Supp. 2007). Identity must have been an issue at trial. Mo. Ann. Stat. § 547.035/West 2002 § Supp. 2007).

"I declare under the penalty of perjury under the Laws of the United States of American that the foregoing is true and correct, and that I am the person named above etc, and I understand that any falsification of this statement is punishable under the provisions of 18 U.S.C. Section 1001 by a fine of not more that $10,000 or by imprisonment or not more that five years or both.

Copy Filed in Federal Court

In sincerity

Pro-se-plaintiff

Robert McCoy II 55949 2-1-2010

F.O.I.A. Appeal Letter (Federal)

Admistrator: Twenty-sixth Judicial District Court
Name of Agency: Law Clerk Bossier/Webster Parish
Address: P.O. Box 310, Benton, Louisiana 71006

Return Address:
2985 Old Plain Dealing Rd
Plain Dealing, La 71064
Date: 1-27-10

To the Administrator:

This is an appeal under the Federal Freedom of Information Act ("FOIA"), 5 U.S.C. Section 552. On 12-20-09 to present date, I made a FOIA request to your agency for one "Full Discovery of Evidence," one "Bill of Info," which has been constantly denied by D.A., counsel, and court. One 10-3-09; 10-7-09; 12-6-09 etc, to present, your agency denied my request because counsel and D.A.'s obligation to provide, but, refuses to do so!!! Please be informed that I consider the requested material clearly releasable under FOIA and consider your agency's policy to be arbitrary and capricious. Under Louisiana (La. Rev. State. Ann. §§ 44:1 to 44:41 (2007), and State "Freedom of Information" Law; I'm entitled to said information. "Freedom of Information Act/Privacy Act Request" gives me the right not only to look at my own record, but allows me to request all public documents, relateing to me. I except that upon reconsideration, you will reverse the decision to deny my request. However, if you do deny this appeal, I intend to file a lawsuit to compel disclosure.

Sincerely,

/s/Robert McCoy II
/s/Robert McCoy II 55949
1-27-10...

IN RE: 26th JUDICIAL DISTRICT COURT

CLOSING OF CLERK'S OFFICE BOSSIER PARISH, LOUISIANA

ORDER

Acting in accordance with La. Const. Art. V, Sec. 1 and the inherent powers of this Court, and considering the emergency created by inclement weather,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Bossier Parish Clerk's Office be and is hereby legally closed for the conduct of business this 12th day of February, 2010, pursuant to L.R.S. 1:55 E (2), for emergency purposes due to weather which "renders it hazardous or otherwise unsafe for employees ... to continue in the performance of their official duties ..."

THUS DONE AND SIGNED at Benton, Bossier Parish, Louisiana, this 11 day of February, 2010.

/s/ Parker Self
Parker Self
Chief Judge

STATE OF LOUISIANA	NUMBER 163572
VERSUS	26th JUDICIAL DISTRICT COURT
ROBERT MCCOY, JR.	BOSSIER PARISH, LOUISIANA

REQUEST AND MOTION FOR DISCOVERY

Defendant is presently charged with 3 Counts of 1st Degree Murder, but for lack of information is unable to properly prepare his defense; and therefore, by counsel request the State of Louisiana voluntarily to disclose the materials specified below, and also moves the Court to order the disclosure of such materials as are not voluntarily disclosed by the State of Louisiana.

1.

In accordance with the provisions of La. C.C.Cr.P. Art 716 et seq., the Defendant request that the Court order the State of Louisiana to permit and authorize the Defendant through his counsel to inspect, copy, examine, test scientifically, photograph, or otherwise reproduce books, papers, documents, photographs, tangible objects, buildings, places or copies of portions thereof which are within the possession, custody or control of the State of Louisiana, and which the State of Louisiana intends to use in evidence at the trial, including any results of reports or copies thereof, of physical and mental examinations and of scientific tests or experiments, of a similar nature, made in connection with the case, that are in possession, custody or control of the State of Louisiana and that the State of Louisiana intends to use as evidence at the trial or were prepared by a witness whom the State of Louisiana intends to call at the trial when such results or reports relate to its case against the Defendant.

WHEREFORE, the Defendant, through the undersigned counsel prays that the State of Louisiana be required to comply with the request of discovery made by the Defendant herein.

RESPECTFULLY SUBMITTED BY:

/s/ Larry English
LARRY ENGLISH #22772
Attorney At Law
415 Texas Street, Suite 320
Shreveport, Louisiana 71101
Telephone: (318) 222-1900
Fax: (318) 226-1660

CERTIFICATE

I HEREBY CERTIFY, that a true and correct copy of the above has this day been forwarded to the District Attorney's Office by placing a copy of same, postage prepaid and properly addressed in the United States Mail.

District Attorney
Bossier Courthouse
P.O. Box 69
Benton, La. 71006

Bossier Parish, Louisiana, this 22nd day of February 2010.

/s/ Larry English
OF COUNSEL

-Cynthia J. Johnston-
Bossier Parish Clerk of Court
P.O. Box – 430
Benton, Louisiana 71006-0430.

-Documents Brief to be entered into the Record and Numbered-

First, let me say; behind every proceeding of this kind of dealing with charges of murder, indeed, behind the entire body of law governing the practices in general law, lies the shadow of another larger question -- the moral question of murder itself. Undeniably, it is the common consensus among all right-minded men and women that murder as such, in the abstract, is evil – and evil that we unfortunately live with as a weakness deeply rooted in the nature of a darkening age in nature & the world we now live in. As a consequence, the entire body of law governing the usage of war and justice has always labored under the burden and shadow of compromise and truth. A compromise, in the end, with man or woman themselves. Secondly, the issue before this tribunal/court is, however, not that of murder itself, or even of one particular war within injustice, but the defendant's guilt or innocence in a particular instance of accused wrongdoings. This issue is; "Is injustice never waged by single individuals, but by many? Therefore, the individual's accused responsibility for particular actions cannot be entirely separated from the collective responsibility as a whole. In the beginning of said pre-trial prep, for instance, there was debate over and still remains debate over individual versus collective responsibility for any actions carried out under orders of deception by higher superiors. It is the opinion of this tribunal/court that the argument by defendant of superior orders is, at best, valid only as a mitigating factor in individual responsibility. Third, and most dif-

ficult of all, the task of this and any murder crime trial is further complicated by the distinction that must be made between the individual's demonstrable criminal intentions and the individual's personal and private conscience. Here again, the law labors under a larger burden, namely the burden of human morality, and it, in turn, labors in the shadow of compromise and truth. Finally, before any tribunal/court; let me say that the jurisdiction of the tribunal/court extends only to criminal actions and criminal intentions demonstrable under the law. Judgement extends no further." "The ultimate court of appeal is the individual conscience." I the accused defendant, must look to myself and to God for the final verdict of innocence or guilt." "God" will validate the innocence of defendant"!

-In Quote-

The ultimate court of appeal is the individual's conscience. And I the accused defendant, must look to myself and God for the final verdict of innocence or guilt"! "God" will validate the innocence of the defendant"!

Pro-se-Attorney
Robert McCoy II 55949
3-1-10

-Cynthia J. Johnston-
Bossier Parish Clerk of Court
Benton, Louisiana

2-28-10:
Grounds for dismissal of all charges

-Attention-
-26th Judicial District Court-

On and about 3:00 p.m. of above date pro-se Robert McCoy II accused defendant observed P.I. David Shanks in Delta Pod at BMX. Upon exclusion of all clients pro-se- McCoy asked P.I. Shanks for a moment to verify a question. Upon asking P.I. Shanks did he receive pro-se- request of appearance on Feb. 23, 2010, he informed pro-se- No! In furtherance defendant asked P.I. Shanks has he done any type of investigating on pro-se- accused case and he informed pro-se- No! – upon valid witnesses of said confirmed miscarriage of justice, due process violations etc of "No- investigation in over 21 months to even try and validate pro-se- defendants innocence is a complete manifest negligence of the laws of the land. This is the worst Judicial defiance and constitution rights violations in Judicial history.

The efforts of the courts and their officers to bring the guilty to punishment, praiseworthy as they are, are not to be circled by the – sacrifice of these great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. To sanction such proceedings would be to affirm judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the constitution, intended for the protection of the people against such unauthorized action.

In complete violation of protection against impairments 1981(c).

Protection against impairment of non-governmental discrimination and impairment under color of state law.-

-Conspire to deprive-

In complete conspiracy with the 26th Judicial to deprive a third-person of any constitutional rights guaranteed by law to defendant.

Secondary violations etc.-

Defamation of character violations are clear, transparent and alive!

Upon reception of said documents pro-se- has filed extensive documents of this judicial breakdown, judicial miscarriage of judicial defiance of all constitutional rights by Judge and staff against defendants.

2nd Circuit Court has been informed of this claim and present evil by all 26th Judicial officials.

Pro-se-
Robert McCoy II 3-1-10

STATE OF LOUISIANA	NUMBER 163572 FILED MAR 3, 2010
VERSUS	26th JUDICIAL DISTRICT COURT
ROBERT MCCOY, JR.	BOSSIER PARISH, LOUISIANA

MOTION FOR CONTINUANCE

NOW INTO COURT, comes defendant's counsel, upon suggesting to the court that the Jury Trial set for May 24, 2010, be upset for 120 days. For the following reason, to wit:

1.

Defendant's Counsel enrolled in the above reference case February 25, 2009.

2.

Defendant's Counsel has just finished a three week civil jury trial and that finish until February 23, 2009 and as of yet has not received on item of discovery.

3.

Defendant counsel has not yet spoken to Defendant as he was retained by Defendant's family.

4.

Defendant's counsel has placed a call to the District Attorney's office to discuss Motion To Continue but was unable to speak personally with him.

5.

Defendant Counsel further avers that this is a Capital Murder Case and given the finality of final punishment if Defendant is found to be guilty, he should be

allowed the Attorney of his choice and given adequate preparation to prepare for trial.

Counsel wishes to have this date reset to a later date.

WHEREFORE, defendant prays that this Motion for Continuance be deemed good and sufficient and that same be allowed filed. Defendant further prays to this Honorable Court that the Jury Trial set for May 24, 2010 be set on a new date.

RESPECTFULLY SUBMITTED,

/s/ Larry English
LARRY ENGLISH
ENGLISH & ASSOCIATES, LLC
Louisiana Bar Roll #:22772
415 Texas Street, Suite 320
Shreveport, Louisiana 71101
Telephone: 318-222-1900
Facsimile: 318-226-1660
ATTORNEY FOR DEFENDANT

STATE OF LOUISIANA	NUMBER: 163572 FILED MAR 08 2010
VERSUS	26th JUDICIAL DISTRICT COURT
ROBERT MCCOY, JR.	BOSSIER PARISH, LOUISIANA

NOTICE OF INTENT TO APPLY FOR SUPERVISORY WRITS

NOW INTO COURT, through undersigned counsel, comes Defendant Robert McCoy Jr. pursuant to Rule 4 of the Uniform Rules for Louisiana Courts of Appeal, who hereby advises this Honorable Court and all parties of its intent to apply to the Louisiana Court of Appeal, Second Circuit, for supervisory writs from the Court's Judgment on the denying *Defendant's Motion To Continue* issued on March 3, 2010.

Respectfully submitted

/s/ Larry English

LARRY ENGLISH
English & Associates
Louisiana Bar Roll #: 22772
One Texas Centre
415 Texas Street, Suite 320
Shreveport, Louisiana 71101
Telephone: (318) 222-1900
Facsimile: (318) 226-1664

ATTORNEY FOR DEFENDANT

STATE OF LOUISIANA	DOCKET NO: 163,572 FILED NOV 16 2010
VERSUS	26TH JUDICIAL DISTRICT COURT
ROBERT McCOY	BOSSIER PARISH, LOUISIANA

MOTION IN LIMINE AS TO (1) TAPED STATEMENTS OF SPARTACUS MCCOY AND (2) ALL PRIOR BAD ACTS OF ROBERT MCCOY

NOW comes Attorney LARRY ENGLISH counsel for Defendant Robert McCoy II who represent that the State intends to introduce the statements of decedent Spartacus McCoy and that if the State is allowed to introduce said statement it would be a violation of the Amendment Confrontation Clause and the Louisiana Code of Evidence Rule 804 (B) (1).

Furthermore, the State intends to introduce evidence of prior acts. Defendant submits that this has no independent relevance, nor can it prove a material issue. Therefore, any prior bad acts of Robert McCoy should not be admitted at trial.

Respectfully Submitted

/s/ Larry English
Larry English #22772
415 Texas 320
Shreveport, Louisiana 71101
(318) 222-1900
(318) 226-1600 Facsimile
Englishlaw2008@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on the 16TH day of November 2010, Defendant hand delivered the Motion In Limine As To (1) Taped Statement Spartacus McCoy and (2) All prior acts of Robert McCoy to the following:

J. Schulyer Marvin
District Attorney
Bossier Parish Court House
P.O. Box 69
Benton, Louisiana 71006

/s/ Larry English
LARRY ENGLISH

STATE OF LOUISIANA	**DOCKET NO: 163,572** **FILED NOV 16 2010**
VERSUS	**26TH JUDICIAL DISTRICT COURT**
ROBERT McCOY	**BOSSIER PARISH, LOUISIANA**

DEFENDANT SUPPLEMENTAL MOTION FOR DISCOVERY

NOW comes Attorney LARRY ENGLISH counsel for Defendant Robert McCoy II who requests the State supplements its Discovery To Defendant with the following

1. All Taped and/or Video Statements Of Any Individuals taken during the investigation of the above referenced matter;

2. Crime Scene Video and Pictures;

3. Insanity Commission Report of Mark Vigen;

4. Lewiston Idaho Police Vision -Hawk- In Car Video of Robert McCoy Arrest;

5. 9-11 Audio Tape;

6. Bossier City Cruiser Video; and

7. Ballistic Test linking ammunition from crime scene to weapon found with Robert McCoy

Respectfully Submitted

/s/ Larry English
Larry English #22772
415 Texas 320
Shreveport, Louisiana 71101
(318) 222-1900

(318) 226-1600 Facsimile
Englishlaw2008@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of November 2010, Defendant hand delivered the Supplemental Motion For Discovery to the following:

J. Schulyler Marvin
District Attorney
Bossier Parish Court House
P.O. Box 69
Benton, Louisiana 71006

/s/ Larry English
LARRY ENGLISH

STATE OF LOUISIANA	NUMBER 163,572
VERSUS	26th JUDICIAL DISTRICT COURT
ROBERT MCCOY	BOSSIER PARISH, LOUISIANA

ORDER

The foregoing considered,

Defendant's Motion In Limine as to (1) Taped Statement Of Spartacus McCoy is granted; and (2) All Prior Bad Acts of Robert McCoy is hereby denied.

THIS DONE AND SIGNED, in chambers on this 16th day of November 2010, at Bossier Parish, Louisiana.

Hon. [Illegible]
JUDGE

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
(318) 227-3700

NO. 46,266-KW

STATE OF LOUISIANA

VERSUS

ROBERT MCCOY

FILED: 12/14/10
RECEIVED: BYHAND 12/14/10

On application of Robert McCoy for SUPERVISORY WRIT in No. 163,572 on the docket of the Twenty Sixth Judicial District, Parish of BOSSIER, Judge Jeffrey Stephen Cox.

ENGLISH & ASSOCIATES	Counsel for:
Larry English	Robert McCoy
	Counsel for:
John Schuyler Marvin	State of Louisiana

Before STEWART, MOORE and LOLLEY, JJ.

WRIT DENIED.

This matter comes before this Court, on application of defendant, Robert McCoy, seeking review of the denial of a motion *in limine* to restrict the state's use of evidence of prior bad acts under La. C.E. art. 404(B). On the showing made, the exercise of this Court's supervisory jurisdiction is not warranted.

Shreveport, Louisiana, this 6th day of January, 2011.

/s/ [Illegible] /s/ [Illegible] /s/ [Illegible]

Filed: January 6, 2011

s/ [Illegible]
Dty.CLERK

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
(318) 227-3700

NO. 46394-KW

STATE OF LOUISIANA

VERSUS

ROBERT MCCOY

FILED: 02/02/11
RECEIVED: BY HAND 02/02/11

On application of Robert McCoy for SUPERVISORY WRIT in No. 163,572 on the docket of the Twenty Sixth Judicial District, Parish of BOSSIER, Judge Jeffrey Steven Cox.

Larry English	Counsel for: Robert McCoy
John Schuyler Marvin	Counsel for: State of Louisiana

Before BROWN, CARAWAY and MOORE, JJ.

ORDER

Upon the application of Robert McCoy for supervisory review of the denial of his motion for continuance, this Court hereby orders that the proceedings below be stayed pending a forthcoming order from this Court.

Shreveport, Louisiana, this 2nd day of February, 2011.

/s/ [Illegible] /s/ [Illegible] /s/ [Illegible]

FILED: February 2, 2011

/s/ [Illegible]
Dty. CLERK

STATE OF LOUISIANA
COURT OF APPEAL, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
(318) 227-3700

NO: 46394-KW

STATE OF LOUISIANA

VERSUS

ROBERT MCCOY

FILED: 02/02/11
RECEIVED: BY HAND 02/02/11

On application of Robert McCoy for SUPERVISORY WRIT in No. 163,572 on the docket of the Twenty Sixth Judicial District, Parish of BOSSIER, Judge Jeffrey Stephen Cox.

Larry English	Counsel for: Robert McCoy
John Schuyler Marvin	Counsel for: State of Louisiana

Before BROWN, CARAWAY and MOORE, JJ.

WRIT GRANTED; STAY LIFTED; REMANDED WITH INSTRUCTIONS.

Applicant Robert McCoy seeks supervisory review of an order of the district court denying his motion for a continuance of his trial for three counts of first-degree murder in which the State is seeking the death penalty. For the following reasons, the writ is granted and the district court is instructed to grant a continuance of this trial.

The minutes of court show that the State filed the charges against Mr. McCoy in May 2008. Although the defendant was initially represented by attorneys from the Public Defender Office, on February 22, 2010, the district court allowed McCoy to dismiss his capital-qualified counsel and to represent himself with the assistance of capital-qualified counsel.

On March 3, 2010, attorney Larry English enrolled as counsel for the defendant, and the capital-qualified assistant public defender attorney was dismissed. Mr. English was not certified as qualified to serve in capital cases. The minutes from that hearing show that Mr. English informed the court that he would "assemble a team" for Mr. McCoy's defense.

On April 23., 2010, the trial court granted the defense a continuance of the trial, which had been scheduled for May 2010, refixed the trial date for February 7, 2011, and set September 15, 2010, as the final date for pre-trial motions.

Despite the passage of the deadline for pre-trial motions, on January 4, 2011, approximately one month prior to the trial date which had been fixed for eight months, the court heard Mr. McCoy's recently filed motion to declare McCoy indigent, apparently in an effort to secure funding for expert witnesses. The State did not oppose that motion.

Because McCoy was now indigent, the Louisiana Supreme Court rules pertaining to the defense of indigents were implicated. See Sup. Ct. Rules, Rule 31(A); LAC 22:XV.915. At a hearing on January 24, 2011, despite his own attorney's assertion at that same hearing that McCoy was "mentally and emotionally compromised," McCoy opted to waive his right to a second attorney. See *State v. Koon*, 96-1208 (La. 5/20/97), 704 So. 2d 756.

At that same hearing, McCoy's attorney asked the court for a continuance in order to obtain experts and develop mitigating evidence for use at the penalty phase of this trial should McCoy be convicted and charged. Despite a trial date approximately one month away and despite a nearly year-old promise to "assemble a team," evidently no work had been done in this capital case to develop this evidence. In addition, McCoy's counsel presented no evidence to the district court to show that he had contacted expert witnesses to determine the length of the continuance he requested.

With no evidence that McCoy required additional time to obtain expert opinion, the district court denied McCoy's request to further delay this long-scheduled trial. McCoy now seeks supervisory review of that ruling.

In furtherance of his application, McCoy has attached copies of letters from two expert witnesses explaining the work required to develop mitigating evidence. These letters, both dated January 25, 2011, were obviously not presented to or considered by the district court at the January 24, 2011 hearing. The letters contain an explanation from the experts of the time required to conduct a meaningful study suitable for use as evidence in a criminal trial.

These facts present this Court with a difficult dilemma. The delays in this case are already largely the fault of the defendant. He has chosen to eschew representation – to which he is entitled – by a pair of capital-defense qualified attorneys in favor of a single attorney who is not capital-defense qualified. That attorney has not diligently pursued mitigating evidence to present during the penalty phase of this trial. See, e.g., *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed.

2d 471 (2003). When the attorney asked for a continuance approximately two weeks before the trial date, he had no information for the district court to show that he had insufficient time to develop mitigating evidence. On the day before jury selection for this jury trial was set to commence, he filed in this Court this emergency request for supervisory review of the district court's ruling, which request was supported by newfound information that the experts would need up to six months of additional time to prepare a mitigation study. Both the declaration of indigence and the obtaining of expert witness assistance could have been fully accomplished long prior to the trial date.

Typically, such a weak showing would lead this Court to deny supervisory relief, especially when the applicant has not shown that the trial court erred in denying a continuance based on the argument and evidence presented at the hearing. However, in a criminal case - and particularly in a bifurcated capital case - the risk of inaction in the face of these problems is that the defendant's rights to due process and effective assistance of counsel will not be preserved, thus leading to a potential reversal on appeal of any conviction and sentence obtained and a second trial at taxpayers' expense.

Thus, this Court reluctantly concludes that this trial must be continued to allow the defendant time to develop mitigating evidence.

Accordingly, we hereby grant the writ, vacate the ruling below, lift the stay previously imposed and direct the trial court to grant Mr. McCoy a continuance of this trial. Although this Court does not sit as a fact-finder, we observe that the information supplied in the letters from McCoy's expert witnesses indicates that these witnesses are already familiar with the case and

the defendant. Accordingly, the trial court should refix this trial to commence as expeditiously as possible while preserving Mr. McCoy's right to present a defense.

In addition, because this Court is not in possession of the entire record of this case, we direct the trial court to ensure that Ms. McCoy is, or has been, fully apprised on the record of the benefits of having two capital-defense qualified attorneys and that McCoy has knowingly and intelligently waived same.

Shreveport, Louisiana, this 3rd day of February, 2011.

/s/ illegible /s/ illegible /s/ illegible

FILED: February 3, 2011

/s/ illegible
CLERK

STATE OF LOUISIANA	NUMBER 163, 572 FILED AUG -5 2011
VS.	26TH JUDICIAL DISTRICT
ROBERT McCOY	BOSSIER PARISH LOUISIANA

DEFENDANTS MITIGATION STAEMENT

NOW INTO COURT COMES Attorney Robert McCoy, Defendant and represented by Attorney Larry English, who respectfully represent at the Defendant will offer the following mitigation:

Robert McCoy emotional and mental state are significant mitigating factors in the murder of Willie Young, Christine Colston and Gregory Colston.

Respectfully Submitted:

/s/ Larry English
LARRY ENGLISH
604 Riverside Drive
New York, New York
Bar Number 22772
Phone: 917 531 39090

CERTIFICATE

I HEREBY CERTIFY, that a copy of the above and foregoing has this __th day of August 4, 2011 has been hand-delivered to Bossier Parish District Attorney's office.

/s/ Larry English
LARRY ENGLISH

IN THE 26TH JUDICIAL COURT
PARISH OF BOSSIER, STATE OF LOUISIANA

STATE OF LOUISIANA,
Plaintiff,

v.

ROBERT MCCOY
Defendant.

No. # 163572
Hon. Jeff Cox, Division C, presiding
[FILED DEC 06 2011]

DECLARATION OF LARRY ENGLISH

Larry English, under penalty of perjury, declares the following to be true:

1. My name is Larry English. I am over 18 years of age, of sound mind, and competent to make this declaration and personally acquainted with the facts stated herein.

2. I am an attorney barred in the State of Louisiana and am presently licensed as out of state counsel. From March 2010 until August 2011 I served as trial counsel in *State v. Robert McCoy.*

3. I was retained by Mr. McCoy's family to assume his representation and enrolled after Mr. McCoy had dismissed his appointed public defenders. I received from the family only a small fraction of the fees I had quoted for the case.

4. Throughout the entire period of my representation, Mr. McCoy adamantly maintained his innocence

and claimed that he was out of state at the time of the killings. Mr. McCoy has maintained this position despite evidence that I regarded as overwhelming that he did in fact commit these killings.

5. When I enrolled as Mr. McCoy's counsel I did not immediately challenge Mr. McCoy's innocence claim but instead said to him words to the effect of: I have no reason to disbelieve you, I'll try to collect all the evidence and get all the State's files and everything and once I review it, I'll come back in and I'll give you my honest assessment of where I think the case is.

6. I believe that usually when you are first dealing with a client facing jail or death they are in denial and your task is to bring them along to deal with the reality of the situation, the state of the evidence, the likely outcome of the trial. Then they can embrace the options and make a rational decision. I tried to take Robert McCoy through this process but there was no opportunity to do this. Robert McCoy believed that law enforcement and others were conspiring against him and he was simply unable to accept the evidence against him.

7. I am an experienced criminal practitioner and I have worked with many clients who I would consider sociopaths who have tried to play me. Even with the manipulators, what happens 99.9% of the time is that eventually they understand their situation and want to get the deal, even if it isn't until the day of trial. Robert McCoy was very different to this, this was not part of his mental makeup. I do not believe that Robert McCoy was denying his involvement in the crime to manipulate me, the system, or anyone else. I am certain that he truly believed that he was out of state at the time of the crime and that law enforcement and

others were conspiring against him. Because of this delusion Mr. McCoy was incapable of rationally dealing with the evidence of his guilt.

8. As time passed I became convinced that the evidence against Robert McCoy was overwhelming. I negotiated with the District Attorney's Office to open up the possibility of a plea of guilty in return for a sentence of life imprisonment. About a month before the July 2011 trial date I confronted Mr. McCoy with the fact that I believed that his case could not be won and that he needed to take a plea. Mr. McCoy simply could not deal with this or accept this reality. As a result of my attempts to persuade him to take a plea, Mr. McCoy came to believe that I was conspiring with the District Attorney's Office and law enforcement to sell him out.

9. On July 12, 2011 I met with Robert at the courthouse and explained to him that I intended to concede that he had killed the three victims in the guilt phase of his trial in an effort to save his life. This was the first time that I had told Robert that I intended to concede to the jury that he was the killer. Robert was furious and it was a very intense meeting. He told me not to make that concession but I told him that I was going to do so. I explained that I felt I had an ethical duty to save his life, regardless of what he wanted to do. I ended the meeting as it was becoming too intense. This was essentially the end of our professional relationship. From that time on he saw me not as his lawyer but as his enemy - part of the system that was conspiring to convict him of a crime he believed that he had not committed.

10. I next went to see Robert at Bossier Max on the weekend before trial was due to start. Robert came out to the interview but expressed surprise and frus-

tration that I was there. He told me that he had already fired me and that I had no business on his case anymore. Robert told me that he had arranged for two other lawyers to come onto the case to replace me. He remained very angry with me and felt that I had betrayed him. Robert made it very clear that he believed that he was entitled to discharge me as his counsel and that he had done so. This was a relatively short interview. I tried to see him again on the Monday but he refused to see me.

11. I know that Robert was completely opposed to me telling the jury that he was guilty of killing the three victims and telling the jury that he was crazy but I believed that this was the only way to save his life. I needed to maintain my credibility with the jury in the penalty phase and could not do that if I argued in the guilt phase that he was not in Louisiana at the time of the killings, as he insisted. I consulted with other counsel and was aware of the Haynes case and so I believed that I was entitled to concede Robert's guilt of second degree murder even though he had expressly told me not to do so. I felt that as long as I was his attorney of record it was my ethical duty to do what I thought was best to save his life even though what he wanted me to do was to get him acquitted in the guilt phase. I believed the evidence to be overwhelming and that it was my job to act in what I believed to be my client's best interests.

12. On Tuesday, July 26, 2011, we had a hearing to determine whether Robert would be permitted to discharge me. The court ruled that I would continue to represent Robert. I raised with the court again the fact that I did not intend to present the defense that Robert wanted but would do what I considered best. The trial judge directed me that this is what I should do.

13. Robert was very determined to go to trial and concerned to avoid any delay. He was looking forward to the day finally arriving and was excited about the prospect of confronting and challenging what he saw as the lies and corruption in the case. Robert believed that he would be successful at trial and would be released. Robert would not have agreed to me seeking any further continuance of the case and very much wanted to go to trial on July 28, 2011. I am certain the Robert did not seek to discharge me as his counsel and either seek a substitute attorney or seek to represent himself for the purpose of delay. I firmly believe that Robert sought to replace me because I would not present the defense he wanted and was going to concede that he was the killer. It is essentially the same reason that he dismissed his earlier appointed attorneys; because they did not accept his claim of innocence and were not investigating and preparing the defense he wanted.

14. I firmly believe that Robert McCoy is insane and was not competent to be tried. Robert knew who I was, who the prosecutor and the judge were, what our roles in the courtroom were supposed to be, that he was accused of three murders and was facing a trial in which he could get a death penalty. However, he could not assist counsel or participate effectively in the proceedings due to his mental illness. He could not rationally understand the proceedings because he saw the evidence, the procedures and the rulings through the lens of his delusion that law enforcement, the prosecutor, the judge and ultimately myself were conspiring against him. Robert could not consult with me with any reasonable degree of rational understanding both because his paranoia and delusions destroyed our pro-

fessional relationship and also because all information was distorted or obscured by his delusions.

15. During my representation I could meet with Robert and talk to Robert and he would cooperate in these conversations as best as he was able. However, Robert was unable to deal rationally with the evidence of his guilt and the case against him. Robert could not recall and relate facts pertaining to his actions and whereabouts at the time of the crime because he truly believed that he was elsewhere at the time of the crime. He could not assist in locating and examining relevant witnesses because his witnesses were a part of his delusions in some cases or their relevance was dictated by his paranoia and his belief in a large scale conspiracy against him. Robert could not review discovery or listen to evidence and assist in assessing any distortions or misstatements because he could not grapple with the evidence in the real world. He could not make rational decisions despite my efforts to clearly explain his alternatives and could not testify except to give vent to his delusions and paranoia.

16. As a direct result of his delusions and paranoia Robert was unable to accept a plea offer that I believe was in his best interests. Not only was Robert incapable of providing or discussing useful factual information about the crime, his extreme paranoia meant that efforts on my part to discuss the case realistically caused him to see me as a part of the conspiracy against him, destroying our working relationship.

17. Robert's delusions regarding his innocence and the conspiracy against him also impaired my ability to prepare for the sentencing hearing. He did not initially refuse to discuss things we needed to prepare for the penalty phase, but he cut off cooperation after I told

him I would concede his guilt in the killings despite his objections. However, even before that he could not discuss the circumstances of the offense in any realistic way and his paranoia had already undermined the relationship of trust needed to work on the sentencing hearing. When I told Robert he needed to plead guilty and began to strongly urge him to do so- he developed a profound distrust of me and anyone working with me.

I declare the following to be true under the penalty of perjury, this 4th day of December, 2011.

/s/ Larry English
Larry English

12-4-2011

MR. & MRS. ROBERT MCCOY, SR.
7323 ALTUS LOOP.
SHREVEPORT, LA. 71106

The Honorable Judge Jeff Cox
26th Judicial District
Bossier Parish Courthouse
204 Burt Blvd # 3
Benton, LA 71006

Dear Judge Cox,

We are the parents of Robert McCoy, Jr. who will be appearing before your honorable Court on or around July 21, 2011. The case is a capital murder case. On July 12, 2011 we met with our son's attorney, Mr. Larry English at the Bossier Parish Courthouse prior to the hearing to get undated on the defense. After listening to Atty. English and seeing him go into what we believe was a tirade we became very disturbed. We are taken aback with Atty. English behavior. Not only could he not answer any of our questions regarding our son's case Atty. English insulted us by talking to us as if we were children, a total disrespect.

We are convinced Your Honor that Atty. English is neither prepared nor capable of adequately representing our son in this case. Because this is a matter of life and death, and in the interest of our son we would like to respectfully request that Mr. English be removed from our son's case, and that a capital murder attorney should be allowed to defend him. In spite of what has been alleged, we love our son and owe it to him to seek the best defense available to him.

In closing, we advanced Atty. English $5,000 (money borrowed against our car title), to represent our son. No question to us that he has put very little time into

this case. If Atty. English is removed as we hope, we also ask the Court to order him to refund us part of the $5,000 ($2,500) given him.

Our pray is that this Court grant our request. Thank you for your greatest consideration.

Sincerely,

Mr. & Mrs. McCoy, Sr.

Cc: D.A. Skylar Marvin

EXCERPT OF NOVEMBER 14, 2008 TRANSCRIPT RE SANITY HEARING

* * *

FRIDAY, NOVEMBER 14, 2008

SANITY HEARING

MR. JACOBS:

Your Honor, McCoy. Your Honor, that's going to be a death penalty case.

THE COURT:

I need the reports on Mr. McCoy. Both of the reports. Y'all have got copies of the reports, don't you? Y'all approach just a minute.

(SIDEBAR CONFERENCE OFF RECORD)

THE COURT:

All right, Ms. Smart, this is Mr. McCoy, Mr. McCoy, step forward, please.

MR. JACOBS:

Your Honor, this is at the bottom of page eight, top of page nine, dockets number one-six-three-five- seven-two (163,572) and also docket number one-six-four- six-four-six (164,646). The matter comes before you today on a Sanity Commission report. And it's my understanding by agreement with counsel — Ms. Smart, please correct me if I get anything wrong, that those sanity reports will be submitted into the record; it's my understand that you're to make a ruling. It's my understanding both psychiatrists who examined Mr. McCoy found him competent to stand trial in this mat-

ter. The state would also add that this is a first degree murder case, there will be no plea offers in this, and we will proceed with this in the death penalty matter. And we would ask to set the matter for trial on June 1, 2009.

THE COURT:

All right.

MS. SMART:

Your Honor, for the record, I did receive both reports. Dr. Richard Williams and Dr. Mark Vigen were appointed to evaluate Mr. McCoy. I did receive both reports and reviewed both and at this time since both doctors were in agreement we'll submit on those reports. And the trial date, we can agree to it at this point with the understanding that if we get in a bind depending on — since it is so far out if we need to ask for a continuance at that point we'll do so. But we will make ever effort to get any motions resolved, hopefully right after the first of the year. But we are trying to get some of that done, some of those files so we can take those up.

THE COURT:

All right. And Mr. McCoy, I need you to state your name and address for the record, sir. Come close to the microphone, please.

MR. MCCOY:

My name is Robert McCoy the second, address 7323 Altus Loop.

THE COURT:

And what city, sir?

MR. MCCOY:

Shreveport, Louisiana.

THE COURT:

Thank you, sir.

MR. MCCOY:

You're welcome.

THE COURT:

Mr. McCoy has been present at all of these proceedings. He was present at the beginning when Mr. Jacobs made his statement and when Ms. Smart made her statement. I want to make that known for the record. The Court does find that Mr. McCoy is competent to assist his — his attorney in this matter and is competent to stand trial according to Dr. Richard Williams and according to Dr. Mark Vigen. The Court finds this case is able to go forward, so therefore, that ruling will be rendered at this time.

MS. SMART:

Thank you, Your Honor.

THE COURT:

Thank you. Mr. McCoy, just be back on June 1st, thank you.

(END OF SANITY HEARING)

EXCERPT OF JANUARY 12, 2010 TRANSCRIPT RE MOTION TO QUASH SUBPOENAS

* * *

That's what - that's what I would like to do. Mr. McCoy, -

MR. JACOBS:

What other motions are pending? I'm just -

THE COURT:

Mr. McCoy, I believe, has a Motion to Change Venue that has been filed by Mr. McCoy. He also has several other motions that I need to rule on at that time. And Mr. McCoy, I would like to take them up all at the same time.

MR. McCOY:

Yes sir.

THE COURT:

Now I know that there is some question as to who represents you. Ms. Smart has been representing you in the past from the Public Defender's Office.

MR. McCOY:

Yes, but if you - May I speak, Your Honor?

THE COURT:

Mr. McCoy, now this is - this is where I want you to be very careful. Let me -

MR. McCOY:

I understand.

THE COURT:

- just explain to you. I'm trying to protect your rights.

MR. McCOY:

Yes sir.

THE COURT:

That's my duty.

MR. McCOY:

Yes sir.

THE COURT:

I'm kind of like the referee trying to protect your rights.

MR. McCOY:

I understand.

MR. JACOBS:

And Your Honor, before the - before he speaks I just want to put it on the record to make sure he understands. I mean if he speaks he speaks, and he is charged with a First Degree Murder and we are seeking the death penalty, so he needs to be very careful what he says if he addresses the Court.

THE COURT:

And that's what I am - that's what I'm going to advise Mr. McCoy. Mr. McCoy, I just want to explain to you that you have the right to remain silent during all of these proceedings. I want you to understand that.

MR. McCOY:

I understand.

THE COURT:

You - anything that you can say, anything you say can and will be used against you in a court of law. I want you to understand -

MR. McCOY:

I understand.

THE COURT:

- that this is being recorded.

MR. McCOY:

I understand.

THE COURT:

And I'm just doing this, Mr. McCoy, because I'm protecting the record.

MR. McCOY:

I understand.

THE COURT:

You understand that you have the right to talk to a lawyer and you have a right to have that lawyer present with you while you are being questioned or while you make any statement, which this case - Ms. Smart has been appointed to represent you during all of these proceedings.

MR. McCOY:

I understand that.

THE COURT:

If you could not afford to hire an attorney, then you understand that one would be appointed to representing you and that's before any questioning or before anything is being stated. Mrs. Smart is here today and acting as your attorney because she has been appointed

to represent you at this time. I have not removed Mrs. Smart from these proceedings or Mr. Hillman or the Public Defender's Office at this time. And you can decide at any time to exercise those rights to not make any statements or not to answer any questions. And Mr. McCoy, I am going to let you make your statement but I want to make the record very clear because of the nature of the charges -

MR. McCOY:

Yes sir.

THE COURT:

- and because of what is happening I want to make it very clear that I have advised you of those rights once again and you understand those rights.

MR. McCOY:

Yes sir.

THE COURT:

And you do acknowledge that you understand those rights.

MR. McCOY:

Yes sir, I do.

THE COURT:

All right. Mr. McCoy, then I -

MS. SMART:

If I may state on the record it's - he's also speaking on the record against his attorney's advice as well.

MR. McCOY:

Okay.

THE COURT:

Then I will let that statement be made.

MR. McCOY:

Okay.

THE COURT:

Mr. McCoy, then I will let you make a statement if you need to make a statement.

MR. McCOY:

Okay. Yes, Your Honor, the filings of my subpoenas, -

THE COURT:

Yes sir.

MR. McCOY:

my subpoenas are validated - witness and validated alibis. The DA is going through the process to quash my subpoenas which are declared under the penalty of perjury, which is validated upon the federal law. And I want to know by what grounds he's moving to quash my subpoenas.

THE COURT:

Well, Mr. McCoy, I mean that is why I'm going to give you a hearing. You're going to get to - the DA is going to get to put on their reasons why they are trying to quash the subpoenas -

MR. McCOY:

Uh-huh (affirmative).

THE COURT:

- and then I'm going to give you an opportunity to state why you need these witnesses available, and I'm going to give you that hearing. And that's why I'm setting that hearing for you to be able to state that. Now you will be able to do that with the assistance of your counsel if you talk to your counsel and you'll be able to do that. But that's why I'm granting a hearing because I have to listen to why they want to quash the subpoenas. I'm listening to you why you want these witnesses to be present at your hearing and I'm trying to do this and do it in an efficient manner. And then what I plan on doing is February 11th if I am through with my jury trials by that term, Mr. McCoy, -

MR. McCOY:

Yes sir.

THE COURT:

- then I'm going to have a hearing on that day, February the 11th, which is a Thursday.

MR. McCOY:

Yes sir.

THE COURT:

If I can't have it on that Thursday then I will try to do it on that Friday.

MR. McCOY:

Yes sir.

THE COURT:

Or if I have to continue it because I'm in jury trials and jury trials are taking precedence, then we will set a time when I will have a day to take up your motions.

MR. McCOY:

Yes sir.

THE COURT:

But Mr. McCoy, the other side of this is and I do want to caution you, that you have an attorney and you need to take those motions through your attorney. I know that you're filing pro se motions. The Court has received those pro se motions and the Court is trying to take recognition of what we're doing. We will make rulings on the motions that have merit, but there are some that have not had merit at the present time that we've had to rule on. But it would be good if you would talk to your attorney and try to coordinate those motions. I know that you are wanting to be actively involved in your defense and I don't blame you on that, sir, but you need to go through your attorney and actively coordinate that with your attorney so that y'all's efforts will not be duplicated.

MR. McCOY:

Yes sir. I want to state on the record, if you don't mind. I have a conflict of interest with my attorney. My attorney throughout the processes have not sufficiently subpoenaed information in which I've asked her to. My attorney haven't filed for motions in the credible time in which she should have, and I will say my counsel is ineffective. I've had problems with Ms. Smart and I don't want Ms. Smart representing me.

THE COURT:

Well Mr. McCoy, I -

MR. McCOY:

And I want -

THE COURT:

- am going to make a determination. That will be one of the first things that I will make a determination on on February the 11th. And if I determine that you have a conflict, which I will let you make that statement, again on February the 11th or February 12th, whichever date that we can get to this, if I determine that you have a conflict and it is an unavoidable conflict, then I will make sure that the appropriate conflict counsel is appointed for you. Now the conflict counsel, because of your circumstances, may be a public defender conflict counsel. I want you to understand that. It will be a different person from the office of Mrs. Smart, but it will be a conflict counsel that will come from the public defender's sector. And you have made statements in some of your motions that your family may be hiring an attorney to represent you.

MR. McCOY:

That's correct.

THE COURT:

Mr. McCoy, let me encourage you that if that attorney is going to be hired to represent you that the quicker that they become involved the better off that you are because then the Public Defender's Office can be relieved, your private counsel can take over this and then you can coordinate these motions with your private counsel and help your private counsel in this defense.

MR. McCOY:

Yes sir.

THE COURT:

All right? So that is my encouragement.

MR. McCOY:

Yes sir.

MS. SMART:

Your Honor, may I respond briefly on -

THE COURT:

Yes ma'am.

MS. SMART:

- me as well as several other people in our office that are working on Mr. McCoy's case have repeatedly tried to go visit with him and he has refused to see us. And I just want that straight on the record. And we will get the jail logs and bring those in for purposes of the hearing.

THE COURT:

And I understand that and I will let you present all that on the record. But Mr. McCoy, look, I'm not going to take this up today. This is going to be for February 11th. I'm not trying to - I'm not trying to have a whole hearing right now. I understand that there's a conflict. If you can resolve it, you need to resolve it. If you cannot resolve it then I'm going to take it up February 11th and we're going to take the appropriate actions.

MR. McCOY:

Yes sir.

THE COURT:

Because this case is set for trial on May the 24th -

MR. McCOY:

Yes sir.

THE COURT:

- and I want it in the posture to be able to do that if we can.

MR. McCOY:

Yes sir.

THE COURT:

All right?

MR. McCOY:

Yes sir.

THE COURT:

So I'm trying to move the case forward because I know that that is in your best interest if I can do so.

MR. McCOY:

That's right.

THE COURT:

All right. So I am trying to protect your rights, Mr. McCoy.

MR. McCOY:

May I say one more statement on the record, sir?

THE COURT:

Yes sir.

MR. McCOY:

Okay. Only reason I don't - didn't allow Ms. Smart and them to represent me promptly is because I validated information with Ms. Smart and Mr. Forsythe for over a year. Mr. Forsythe cussed me out, I mean verbally up there in front of all the deputies up there. Mr. Smart - Ms. Smart and Mr. Smart, when I filed my motions for - my motion for a fast, speedy trial, Ms. Smart

said she would deny my motions and denied my motions she did. I filed a fast and speedy trial motion, Your Honor, seven days after I was arrested, well basically arraigned. And Ms. Smart - it was supposed to be 15 days after your arraignment, a motion for speedy trial, suppression of evidence supposed to be filed. With Ms. - with the evidence and most of all the years of experience Ms. Smart has as counsel, doing the right thing Ms. Smart should have filed my motions as my counsel.

THE COURT:

Okay. Mr. McCoy, I understand what you're saying to the Court but I want to take all of this up February 11th.

MR. McCOY:

Yes sir. Yes sir.

THE COURT:

Because I'm setting aside a full day for y'all to be able to make these motions and arguments and that will let Ms. Smart make her arguments and statements. But Mr. McCoy, again, the other side of it is if your family is going to hire private counsel, they need to have counsel here on February 11th which that may resolve all of this conflict at that time.

MR. McCOY:

It will be March, Your Honor, when they hire private counsel. It will be March.

THE COURT:

Mr. McCoy, I'm just telling you -

MR. McCOY:

Yes sir.

THE COURT:

- that between now and then I will resolve the conflict if I can.

* * *

EXCERPT OF FEBRUARY 11, 2010 TRANSCRIPT RE MOTION TO QUASH SUBPOENAS

* * *

THURSDAY, FEBRUARY 11, 2010

MOTION TO QUASH

THE COURT:

All right, ready for the McCoy matter, please.

MR. MARVIN:

Yes, sir, Your Honor.

THE COURT:

All right.

MR. MARVIN:

That's number one-six-three-five-seven-two (163,572), the State versus Robert McCoy.

THE COURT:

All right, Mr. McCoy? All right, Mr. McCoy?

MR. MCCOY:

Yes, sir.

THE COURT:

If you'll state your name and address for the record, please.

MR. MCCOY:

I'm pro se, Robert McCoy, 7323 Altus Loop.

THE COURT:

And what city is that, please?

MR. MCCOY:

Shreveport, Louisiana, sir.

THE COURT:

Thank you, sir. All right, we're ready to proceed. You ready to proceed, Mr. Marvin?

MR. MARVIN:

Yes, sir, Your Honor. Your Honor, the state has filed a motion to quash some subpoenas that Mr. McCoy requested in proper person and the state did that for several reasons. One, he is represented by the Bossier Parish Public Defender's Office and we believe that any subpoenas would more -- be more properly requested through counsel of record. Also, there does -- there are, I think, twelve people requested in the subpoenas. The state -- a lot of those individuals contacted the state and state they have no idea who Mr. McCoy is or why they would be subpoenaed. The Attorney General's Office contacted the state on behalf of a Justice of the Peace that the Attorney General's Office is a -- I guess you would call them some -- in some sort of supervisory capacity of all JP's in the state. And they attempted to request if they needed to enroll on the Justice of Peace's behalf. And in discussing that matter we never could determine any valid legal reason even arguably could be used in Mr. McCoy's defense. And then there is a limit on the number of subpoenas that can be requested at the parish's expenses from the defendant. And after talking with Mr. McCoy's counsel of record, I'm very much aware they attend to subpoena other individuals and if those individuals are necessary for a valid defense then it would be -- they -- they may very well be in a position where they have to pay for them, the costs of that witness. So -- and we -- we believe

that all of those subpoenas were — were requested purely for harassment and just for delay of this matter.

THE COURT:

Okay. Mr. McCoy?

MR. MCCOY:

Yes, sir.

THE COURT:

All right, sir, you are represented by the Public Defender's Office at the present time. And just -- let me -- hear me out, please. Okay? You're represented by the Public Defender's Office at the present time. I want to advise you of your rights because I have to advise you of the rights every time because you're going to make some statements.

MR. MCCOY:

Yes, sir.

THE COURT:

So I want you to understand your Miranda warnings before you say anything in this courtroom. You have the right to remain silent. Anything you say can and will be used against you in a court of law. Sir, this is being recorded, you are in a courtroom at this time, anything that you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have that attorney present with you while you're being questioned. I have appointed the Public Defender's Office to represent you on these charges. Mr. Fish is present in this courtroom at the present time and he is here and as acting as your attorney. All right? If you couldn't afford to hire an attorney one would be appointed to represent -- represent you before any ques-

tioning if you wished. Again, the Court has appointed the Public Defender's Office to represent you in these matters. Your attorney is present and I would suggest to you that you talk to your attorney before making any statements because this matter is being recorded. You can decide at any time to exercise those rights and not answer any questions or make any statements. I want you to understand these rights, Mr. McCoy.

MR. MCCOY:

Uh-huh (affirmative).

THE COURT:

Because this is a very serious matter that we're dealing with.

MR. MCCOY:

I understand.

THE COURT:

I want you to understand your rights. I want you to know those rights. Mr. Fish is present. Mr. Fish is ready and able to assist you as your attorney and willing to assist you as your attorney at this time. But if you wish to make any statements, Mr. McCoy, you are doing so at your own jeopardy and at your own risk and I want you to understand that.

MR. MCCOY:

Yes, sir.

THE COURT:

Do you understand those rights, sir?

MR. MCCOY:

I do, sir.

THE COURT:

Do you voluntarily waive those rights, sir?

MR. MCCOY:

Yes, sir, I do.

THE COURT:

And you understand that any statements you made will -- any statements that you make in this court - courtroom will be recorded and that they can be used against you at a future date, sir?

MR. MCCOY:

Yes, sir, I do.

THE COURT:

All right, you understand all of those rights?

MR. MCCOY:

Yes, sir, I do.

THE COURT:

All right, then are you voluntarily waiving those rights?

MR. MCCOY:

Yes, sir, I am. All right, Your Honor, I want --

THE COURT:

Mr. Fish, I advised him of his rights, sir.

MR. MCCOY:

Your Honor, I would like to present to the Court today under Ferret versus Carroll -- California. I've also presented to the Public Defender's Office a valid -- requested document for respective counsel to assist me through the proceeding that I'm going through and not

to collate themselves within my attorney aspects. But I ask them to assist me through it because I am a competent defendant, and I am literate, and I'm up under Ferret versus California. You know, I am eligible for -- to represent myself and not being able to represent myself when I'm eligible is a violation of my Sixth and Fourteenth Amendment right. I've given the Public Defender's Office a year and a half of opportunities to represent me and they did not represent me. And being competent, and being an understanding defendant, I have the right up under the United States Constitution to represent myself and not to be forced to have representation on me. And my subpoenos (sic) that I subpoenaed, also, I have a right to subpoena whomever that I choose in my own favor. And not just in my own favor but to be specified in the -- in the court records. And --

THE COURT:

All right, sir -- sir, Mr. McCoy, you're bringing up two different things at the present time. Mr. Fish?

MR. FISH:

Your Honor, briefly in response to that. We would have of coursed jointed in Mr. McCoy's motion to, if I understand it, is to represent himself. We have attempted through several attorneys, investigators, our mitigation specialist, they -- he has refused to cooperate with all of us. I understand that that refusal is now extending to me, also.

MR. MCCOY:

That's right.

MR. FISH:

As far as the subpoenas go Mr. Marvin is correct if -- if we are to represent him then of course we don't want to use up all of our allowable subpoenas on witnesses that we don't see any purpose for. I would like to be able to make those -- those decisions myself at the appropriate time. And I wouldn't want to be hampered by any numerical limit on those that might be exhausted by these subpoenas. I don't know the significance of many of those -- of these subpoenas that he's requested but I -- I would join in his motion that he be allowed to represent himself and that the Public Defender's Office be allowed to withdraw.

THE COURT:

Mr. McCoy, this is something that I have to question you about, sir, and I want you to understand this because we're getting down to a motion to represent yourself. All right, I've advised you of your Miranda rights.

MR. MCCOY:

That's right.

THE COURT:

I've advised you of the right to remain silent and the right to have an attorney.

MR. MCCOY:

That's right.

THE COURT:

Now you're stating that you want to represent yourself.

MR. MCCOY:

Yes, sir, because representing myself, Judge Cox, allows me the aspect to subpoena my own witnesses in my own favor. And I subpoenaed my own witnesses in my own favor because my witnesses that I subpoenaed are creditable witnesses --

THE COURT:

All right --

MR. MCCOY:

--that has --

THE COURT:

Mr. --

MR. MCCOY:

--validation as far as -

THE COURT:

Mr. --

MR. MCCOY:

--connection --

THE COURT:

Mr. McCoy, I'm not trying to interrupt you but I'm trying to take one motion at a time.

MR. MCCOY:

I understand.

THE COURT:

All right, so give me -- let me handle my courtroom.

MR. MCCOY:

Yes, sir.

THE COURT:

Okay?

MR. MCCOY:

Yes, sir.

THE COURT:

All right, the motion to represent yourself. You understand that this is a murder trial?

MR. MCCOY:

I do.

THE COURT:

You understand that the life sentence -- I mean, that the death penalty is on the table at this time?

MR. MCCOY:

Yes, sir.

THE COURT:

You under -- what grade did you graduate from in school?

MR. MCCOY:

I'm a college -- I'm a college graduate, sir.

THE COURT:

All right, what college did you graduate from?

MR. MCCOY:

University of Rice, sir.

THE COURT:

All right, and what degree did you get from the — from that college?

MR. MCCOY:

Business Administration.

THE COURT:

All right, you're well able to read, write and understand the English language, is that correct?

MR. MCCOY:

Very much so.

THE COURT:

You understand that you have the right to continue with that not guilty plea and you have the right to a trial by jury on this matter?

MR. MCCOY:

I do, sir.

THE COURT:

You understand that the D.A. has to prove his case beyond a reasonable doubt in this matter?

MR. MCCOY:

I do, sir.

THE COURT:

You understand that you're entitled to an attorney?

MR. MCCOY:

I'm going to have one next month as I spoke to you last --

THE COURT:

Mr. --

MR. MCCOY:

I have paid counsel but I don't want to be represented by the Public Defender Board.

THE COURT:

All right, but Mr. McCoy, this is you asking to represent yourself at this time.

MR. MCCOY:

That's right, that's right.

THE COURT:

You understand that an attorney has been appointed to represent you in this matter but you're asking this Court to represent yourself at this time?

MR. MCCOY:

That's right.

THE COURT:

Do you understand, sir, that you have the right to remain silent during all proceedings and the right against self-incrimination?

MR. MCCOY:

Yes, sir.

THE COURT:

And you understand that you or your attorney would have the right to cross examine the D.A.'s witnesses and you have the right to confront any accusers against you?

MR. MCCOY:

Yes, sir.

THE COURT:

All right, I've given you all of those rights. You understand that if you act as your own attorney that you're going to have to maintain the Court rules of evidence and that you're going to have to follow the Court's decorum if you act as your own attorney?

MR. MCCOY:

Yes, sir, I understand that, that's why next month I will have my own paid counsel but too, I'm representing myself at this point, Judge Cox, because my valid evidence if I am not the representor (sic) of myself my subpoenas (sic) won't stand but my subpoenas (sic) are valid rules up under the federal rule of evidence 402, 403 –

THE COURT:

Mr. – Mr. McCoy, this is not a federal courtroom, this is a state courtroom –

MR. MCCOY:

I understand but –

THE COURT:

And they apply – Mr. McCoy, do not interrupt me while I'm talking, sir.

MR. MCCOY:

Yes, sir. Yes, sir.

THE COURT:

That's one of the first rules that you're going to learn.

MR. MCCOY:

Yes, sir.

THE COURT:

All right, I control this courtroom, you do not.

MR. MCCOY:

I understand, Judge.

THE COURT:

All right, so we're going to talk but we're going to talk intelligently.

MR. MCCOY:

Yes, sir.

THE COURT:

All right, first of all you're asking to represent yourself. I believe that you have the education if that is what you want to do but I am strongly and I mean very strongly encouraging you not to represent yourself in this matter, sir. You have to stick to the Court rules, you have to stick to the codes of evidence, and this is a very serious matter. I am strongly encouraging you not to represent yourself because of the complexities of the law in this matter and the evidence regarding this matter. Do you understand that I am strongly encouraging you not to do this, sir?

MR. MCCOY:

Yes, sir, I understand that.

THE COURT:

Okay, are you voluntarily representing yourself?

MR. MCCOY:

Yes, I am, until my counsel enrolls next month, yes, I am.

THE COURT:

Do you knowingly represent yourself? I mean –

MR. MCCOY:

Well, this is the first time I've ever been in a situation like this but I have the law knowledge to proceed forward, and yes, sir, I am currently still presently going to represent myself until the proceeding in March when my paid counsel enrolls in.

THE COURT:

And do you know who your paid counsel is going to be, Mr. McCoy?

MR. MCCOY:

Yes, sir, but I don't want to state it on record, I'll just wait until he enrolls because I've been having –

THE COURT:

When is he planning on enrolling, Mr. McCoy?

MR. MCCOY:

No later than March the 1st.

THE COURT:

Mr. McCoy, you understand that this is a May 24th trial date?

MR. MCCOY:

And I understand.

THE COURT:

That it will not be upset?

MR. MCCOY:

I understand, I'm prepared to go, Your Honor.

THE COURT:

All right, you are prepared to go on that date?

MR. MCCOY:

I'm prepared. I'm ready.

THE COURT:

Is your –

MR. MCCOY:

I've been ready to go, Your Honor.

THE COURT:

All right, Mr. Marvin?

MR. MARVIN:

Could we ask the Court to just inquire if he doesn't want to give the name of his counsel in the event that something happens and that gentleman or lady does not voluntarily enroll what his intentions are?

THE COURT:

Mr. McCoy, that is a valid question.

MR. MCCOY:

To still proceed forward, Your Honor.

THE COURT:

You would still proceed forward?

MR. MCCOY:

Yes, sir.

THE COURT:

Representing yourself?

MR. MCCOY:

Yes, sir.

THE COURT:

And you understand, sir, that the death penalty is on the table?

MR. MCCOY:

Yes, sir, I do.

THE COURT:

Do you understand that your life is at stake in this trial?

MR. MCCOY:

Yes, sir, I do.

THE COURT:

And you understand that you'll be held to the same rules of standards as an attorney if you represent yourself?

MR. MCCOY:

Yes, sir, I do. And I know this is a complex situation, Your Honor, but this is my life and this is very, you know, this is a very complex situation but I know the steps that I'm taking. I know the, you know, the advantages and disadvantages but I choose to proceed forward because this is for my best interest.

THE COURT:

Mr. McCoy, you understand how much I am strongingly – strongly encouraging you not to do this, sir?

MR. MCCOY:

I under – I understand, Your Honor.

THE COURT:

Then you –

MR. MCCOY:

But I must proceed forward.

THE COURT:

Mr. McCoy, you understand that I am trying to protect your rights in every manner in this – in this trial in this proceeding?

MR. MCCOY:

I understand, Your Honor, but to quash my subpoenos (sic) of due validated witnesses that has very strong ties to this case will be unconstitutional and the only way to protect –

THE COURT:

Mr. McCoy, I'm not on that right now.

MR. MCCOY:

All right.

THE COURT:

I'm fixing to go to that in just a minute.

MR. MCCOY:

All right.

THE COURT:

But you understand that I am trying to protect your rights in this matter and you understand that I am strongly encouraging you not to represent yourself?

MR. MCCOY:

I understand your – your concern, Your Honor, but I'm – I will still proceed forward until my counsel enrolls next month.

THE COURT:

And you're doing this voluntarily and nobody has forced you to do this?

MR. MCCOY:

Nobody is forcing me, Your Honor.

THE COURT:

And even if your counsel does not enroll in March as you predict –

MR. MCCOY:

But I'm a hundred percent sure he is.

THE COURT:

All right, but if he does not –

MR. MCCOY:

I'm still ready to proceed forward, Your Honor.

THE COURT:

You're still ready to proceed forward on May 24th?

MR. MCCOY:

Yes, sir.

THE COURT:

The minute that your counsel enrolls, Mr. McCoy, he has a duty to contact Mr. Schuyler Marvin with the district attorney's office and consult with Mr. Marvin –

MR. MCCOY:

Yes, sir.

THE COURT:

– regarding this case –

MR. MCCOY:

I understand.

THE COURT:

-- so that we can move it forward.

MR. MCCOY:

I understand.

THE COURT:

Okay, Mr. McCoy, based on you knowingly, intelligently, and voluntarily waving your right to counsel, sir. Based on the Sixth Amendment of the Constitution of the United States. Based on that you have represented to me that you will represent yourself on May 24th that this matter will go forward regardless, I will allow you to represent yourself because you do know the penalties that you're facing. You understand that you have to follow the decorum of the Court and you also understand, sir, that you are going to be held to the same standards as an attorney. However, I will appoint Mr. Randall Fish with the Public Defender's Officer to be ready to assist you in this matter. And he will be able to assist you on matters of law and in this case. All right?

MR. MCCOY:

Yes, sir.

THE COURT:

But I am making that appointment.

MR. MCCOY:

But he is my assistant?

THE COURT:

Yes, sir, you're in charge of your case, sir.

MR. MCCOY:

Thank you, sir.

THE COURT:

All right, Mr. McCoy, now I will go to the motion to quash the subpoenas. Mr. McCoy, the subpoenas have to be done in good faith. They have to be apart of your case in chief.

MR. MCCOY:

And they are, Your Honor.

THE COURT:

All right, then I — Mr. McCoy, I'm not asking you

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EXCERPT OF MARCH 3, 2010 TRANSCRIPT RE MOTION FOR CONTINUANCE

* * *

[MR. ENGLISH:]

Your Honor, we filed a motion to continue and I -- and I laid out -- I laid out in the reasons why I'm asking the Court for a continuance. I was hired in this in the middle of a three week civil jury trial over in Judge Scott Creighton's courtroom. I had originally when Mr. McCoy was first became -- was first detained in this matter, I had some initial representation of him way back when. That was the last contact I ever had with Mr. McCoy or -- or about this case. It really didn't come back to me again until his family approached me last month about retaining my services, which I agreed to do, Your Honor. And I'm -- you know, I'm saying, I'm basically handling this case pro-bono but it is what it is. Given the fact, Your Honor, I've not reviewed one file; I don't even know the names of the victims in this case, Your Honor. And I understand this case has a -- has a -- has a trial date set in May. Mr. McCoy has filed a number of motions; I understand he filed a speedy trial motion. I've talked to Mr. McCoy today; I'm going to adopt all the motions that he filed except that one. That one we're withdrawing, that motion for a speedy trial. I'm asking that the Court would consider upsetting for the reasons stating in my -- and I'm not going to read -- go through all of them you have them in front -- in my motion. I'm going to ask that the Court would consider upsetting that trial date and sitting a trial -- new trial date in March -- in the fall, Your Honor, preferably after September because I have a heavy trial docket in the month of September. I would ask the

Court to do that given what the gravity of this case is. Mr. McCoy is going to go on trial for his life and given what the gravity of the trial -- of the case is; I understand that I'm coming into this case late. I understand that there's been a lot of motions filed and a lot of lawyers and a lot of people fired and all of that. I've been doing this a pretty good -- a pretty long time though, Your Honor, and I -- and I -- I think I've gained the ability to come in and come up to speed fast and get control of a case as well as a client, Your Honor, and Mr. McCoy and I have talked. Based upon our conversations, I'm confident that he will rely on my counsel and allow me to be the counsel in this case. We had a very candid conversation about this. That I would be the only voice from this day forward speaking for Mr. McCoy; it would be the only voice that would be heard in this case until we go to trial. And given what, the gravity of this case is and given the -- the -- not only to Mr. McCoy but for the entire community. As I stated in my motion, I think Mr. McCoy has the right to have the lawyer that he wants, which I'm in this case now and I'm the lawyer that he wants. But given the gravity, Your Honor, I need proper time to prepare for this case and so that if this case comes to trial that Mr. McCoy gets the best representation that he can, given what the stakes are.

THE COURT:

All right, thank you, Mr. English. Mr. Marvin?

MR. MARVIN:

Your Honor, we're going to defer to the Court, I -- I'm -- I'm aware of the order that you signed that says, basically, I believe it said, that you wouldn't even entertain a motion for continuance but -- and I discussed that with Mr. English prior -- earlier this morning. We

will be ready for trial on May the 24th. I understand everything of what he said and I do realize that this is a capital murder case. But I'm also aware of the Court's stern language previously and I'm also aware of Mr. McCoy's representation to the Court that he didn't want a continuance and he was proceeding forward. But whatever the Court rules, or however, the Court rules, we would like there to be some inquiry as to the relief that Mr. Randall Fish is. Whether he is -- if Mr. English continues as counsel that Mr. Fish should be relieved of his duties. And also some inquiry, even though he has retained counsel and not Court appointed counsel, to whether or not Mr. English is certified in death penalty cases and let Mr. McCoy acknowledge that. Whether he is or he isn't, I don't know, but I don't want that to become an issue later. But --

MR. ENGLISH:

May -- may I address the state for the record, Your Honor?

THE COURT:

Yes, sir.

MR. ENGLISH:

I am not certified in -- in death penalty cases but I have already made calls to bring on board lawyers, are you with me, Your Honor? Who are -- who are certified and I will be assembling a legal team together to try this case. Mr. McCoy is -- is -- he's aware of that and I think that Mr. McCoy is prepared to state on the record that he understands that -- that I'm not certified in death penalty cases but that I will be assembling a team of lawyers that are that will be assisting me in this case that I -- that does have experience in capital

murder cases to make sure that all of his rights are protected, Your Honor.

THE COURT:

Mr. McCoy, you understand that Mr. English, and I'm asking you this, that you understand that Mr. English is not certified in death penalty cases, is that correct?

MR. MCCOY:

Yes, sir, that's correct, Your Honor.

THE COURT:

And you're satisfied that he will assemble the team that he needs in order to assist him in this case?

MR. MCCOY:

Yes, sir, Your Honor.

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EXCERPT OF APRIL 23, 2010 TRANSCRIPT RE MOTION FOR CONTINUANCE

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FRIDAY, APRIL 23, 2010

MOTION FOR CONTINUANCE

MR. JACOBS:

Your Honor, are you ready for Mr. McCoy?

THE COURT:

Yes, sir, anytime.

MR. JACOBS:

Let me call that up at this time.

(BENCH CONFERENCE OFF THE RECORD)

THE COURT:

All right, Mr. McCoy, come forward and state your name and address for the record.

MR. MCCOY:

My name is Robert McCoy; my address is 7323 Altus Loop, Shreveport, Louisiana.

MR. ENGLISH:

Your Honor, Larry English, representing Mr. McCoy. Your Honor, I'm respectfully going to re-urge the Court to grant our motion to continue. For the reasons that were stated previously but also I'm having trouble, Your Honor, putting together a legal team to represent Mr. McCoy because nobody wants to step into a capital murder case that they've got to go to trial within such a short period. I'm still reviewing files and

evidence in this case, Your Honor. We're still trying to – I'm still not up to speed or nearly ready to undertake the representation of Mr. McCoy. Given that Mr. McCoy is facing the ultimate justice that can be put down by society, I'm asking the Court strongly and re-urging the Court to please grant my motion to continue so that I'm able to adequately represent Mr. McCoy. I think to to – to – do so otherwise would – would jeopardize Mr. McCoy's representation but also, Your Honor, cost the state a lot of money in terms of – as this case would move forward as most of these cases do. So I'm going to re-urge the Court and ask that the Court grant my motion to continue.

THE COURT:

All right, Mr. Jacobs?

MR. JACOBS:

Your Honor, Charles Jacobs, on behalf of the 26th JDC District Attorney's Office. I do agree with Mr. English that Mr. McCoy is facing the ultimate penalty which is the death penalty in this matter. However, on behalf of the district attorney's office, Your Honor, this case has been pending for a long time. And Mr. McCoy has gone through several different attorneys and has been adamant that he, you know, he intends on going to trial and the case will not be pled. We are prepared at this time to move forward, however, we understand the Court's consideration in this matter. We understand that – the con – the conscripts that the Court is under but at this time we would respectfully note and I respectfully object to the continuance.

THE COURT:

All right. Mr. English, any other statements?

MR. ENGLISH:

Your Honor, I – I – again, I would – I understand. I just got involved in this case and I understand that Mr. McCoy – Your Honor, we're all lawyers; he's been representing himself. And we don't need to address that issue because we're all lawyers in this courtroom and we understand certainly that alone, Your Honor, causes me a lot of concern. I'm not like taking this case over from another lawyer; I'm taking this case over from Mr. McCoy. And so given that, Your Honor, I would again ask the Court – re-urge the Court to grant my motion to continue.

THE COURT:

Mr. English, Mr. McCoy understands that – and this is something that I will ask, May 24th, I promised Mr. McCoy that he would go to trial. He is withdrawing his motion for a speedy trial, is that correct?

MR. ENGLISH:

We did that the last time we were here.

THE COURT:

I know but I'm making sure –

MR. ENGLISH:

Yes, he is – he is withdrawing his motion.

THE COURT:

He understands – and this is the consideration that the Court has. The Court understands that this is the ultimate penalty because the death penalty is on the table. The Court understands that this will go up and down the chain many different times if the death penalty is handed down. And the Court understands that you have just recently gotten involved. The Court is faced with trying to save the taxpayers money because

Mr. McCoy has been with us for a period of time and I understand that the state is ready to go. But then the ultimate decision is will it save the taxpayers money by allowing this continuance because it may have to be retried if you're not allowed the opportunity to be prepared. Which may be returned back to this Court for another trial and we would have to go through this procedure again. So the Court is caught between a rock and a hard place. Mr. English, I want you to understand that if I grant this continuance you will not be allowed to withdraw.

MR. ENGLISH:

I understand, Your Honor.

THE COURT:

You understand that I am going to set a hard and fast date; it will be tried on that date. And it will go on that date and we will go forward until such time as this trial is completed. I will set a date, any pre-trial motions will need to be filed, if there are any motions, and they will all be taken up well in advance.

MR. JACOBS:

Your Honor, and we understand the Court's ruling in that matter.

THE COURT:

I haven't – I'm just still – I'm just still going through my reasons and –

MR. JACOBS:

Yes, sir.

THE COURT:

– back and forth with why I'm in – between the rock and the hard place. At the present time I will grant the motion for continuance.

MR. JACOBS:

Yes, sir.

THE COURT:

Because I believe that ultimately it will save the taxpayers money and expense so that we can attempt to try this only one time and reach a resolution on that date. I know that Mr. McCoy has been with us for a period of time but the other side of it is Mr. English has recently enrolled. Mr. McCoy, I did keep my promise to you, sir.

MR. MCCOY:

Yes, you did, sir.

THE COURT:

And I gave you my word but then in this situation Mr. English is representing you. I will not allow him to withdraw but I will allow him to have opportunity to get prepared for this trial. I believe my date in 2011, and this – and let me put on the record why I have to go to 2011. Every other date I do not have a two week period. I believe that this trial will take two weeks. The first time that I have available to try this trial for two weeks is February the 7th, and I believe that that – do you have a 2011 calendar? Does anybody have a check book with a 2011 calendar on the back? Let's just make sure of this.

MR. ENGLISH:

I got –

MADAM CLERK:

I do but I just don't have a court calendar.

THE COURT:

All right, I believe that date is February the 7th, which is a Monday. It was February 8th of this year –

COURT REPORTER:

February 7th is a Monday in 2011.

THE COURT:

February 7th. This matter will be set for trial on February the 7th. I will set this as a hard and fast

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EXCERPT OF NOVEMBER 16, 2010 TRANSCRIPT RE MOTION IN LIMINE AND SUPPLEMENTAL MOTION FOR DISCOVERY

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the state may be attempting to do that anyway.

MR. MARVIN:

That's correct, Your Honor. He – Mr. English has filed a Motion in Limine. Do you have that?

THE COURT:

Yes sir, I do. I just got it up here, sir.

MR. MARVIN:

Okay. Spartacus McCoy is Robert McCoy's brother and after Mr. Spartacus McCoy gave a taped statement he died and, you know, we did not intend to present that taped statement into evidence at the trial of this matter, so we have no objection to that. The second part of his motion involves the prior bad acts of Robert McCoy, and to me it looks like specifically the underlying battery charge that gave rise to the original arrest warrant before the deaths of the victims in the present matter against Yolanda Colston. But the state would argue, and we can take that up at this time, that that is – you know that's evidence of the whole res gestae of why the police were looking for Robert McCoy and why he came looking for Ms. Colston and her relatives. So, you know, we very much intend to present that evidence and believe it's necessary for the trier of fact to get a full understanding of what was going on between Ms. Colston and Robert McCoy.

THE COURT:

All right.

MR. ENGLISH:

We filed, Your Honor, for any – to prevent the state from bringing in any previous bad acts by Mr. McCoy. We specifically highlighted that one because we knew that the state had already, I believe, filed an intention to use that, highlighted it. While we don't believe that it has any relevance as to whether or not Mr. McCoy committed the murders of which he is charged with. We don't believe that represents any material issue. Those are two separate total issues, has absolutely nothing to do as to whether or not the state can prove its case or not. We believe to put that evidence in front of a jury is so prejudicial that it would cause Mr. McCoy not to have a fair trial. It has absolutely no relevance as to whether or not Mr. McCoy committed those murders on that particular day.

THE COURT:

Mr. Marvin, I'll let you respond please.

MR. MARVIN:

Well, Detective Kevin Humphries was the detective assigned to the alleged battery on Yolanda Colston by Mr. McCoy. Mister – Detective Humphries obtained an arrest warrant for Robert McCoy and was actively looking for Robert McCoy. And Mr. McCoy knew that, it is our understanding, and Mr. McCoy was attempting to find Ms. Colston for either one of two things, to either try to convince her to drop her allegation that he had battered her or to harm her. And we can argue either of those two things independent of each other because when he went to these victims' house he, and the 9-11 tape bears this out, he was looking for her. Now what happened to the victims in this case after he ar-

rived at their house is, you know, certainly the issue at the heart of this matter. But, you know, he went there for one of those two reasons only. I can't think of another reason why he would have. But either of those two reasons is necessary for the jury to understand why Robert McCoy came into contact with those victims on this particular night.

THE COURT:

And let me ask this. The only thing that you're attempting to present is the prior bad act of the battery on Ms. McCoy; is that correct?

MR. MARVIN:

That's right.

THE COURT:

And you're stating that that is part of the res gestae?

MR. MARVIN:

Yes. And, I mean, to be quite honest I don't intend to go into, you know, minute details of what happened in that aggravated battery. That's not even at trial or anything like that, but to know why Robert McCoy went to the victims' house that night and why he was searching for Yolanda Colston that night is, I mean, directly relevant. That's what happened. That's why. It's on the 9-11 tape.

THE COURT:

Okay, Mr. English, I'll let you respond, sir.

MR. ENGLISH:

Your Honor, there's – first of all, there's no evidence that Mr. McCoy went there that night looking for – Please.

MR. McCOY:

Okay.

MR. ENGLISH:

That Mr. McCoy went there looking for Yolanda Colston. There is a 9-11 tape. It speaks for itself, but again it does not in any way infer – There's no evidence that Mr. McCoy went there looking for those people. If fact, Your Honor, there's no evidence that Mr. McCoy was there, okay. And to allow that evidence to come in is so prejudicial that it's going to prevent Mr. McCoy from having a fair trial. There was no act of violence committed against Yolanda Colston on May 5, 2008. None whatsoever. There was no threat made to her on that date. There is no evidence that there was any threat made to her on that date. It is a – Those were two independent acts that has absolutely no relevance. Mr. McCoy is on trial for the murders of three individuals that were in that house. He's not on trial in any way for undertaking any criminal action against Yolanda Colston. It is – it bears no material issue. It is a totally independent issue that happened earlier and it does not bear any incident up to this particular case, Your Honor.

THE COURT:

Why does it not go to the res gestae of what, if this is as the state says, why does it not go to the res gestae of Mr. McCoy?

MR, ENGLISH:

Because, Your Honor, there is no evidence – there is no evidence to suggest, which is what the DA is trying to suggest, Your Honor, there is no evidence to suggest that Mr. McCoy went to that house looking for Yolanda Colston. There's no evidence, Your Honor, that Mr. McCoy – nobody, nobody, there's not one eye witness that has put Mr. McCoy at that site. There is not one piece of DNA evidence that has put Mr. McCoy at that site. So the state has no evidence that Mr. McCoy was ever in that room, none whatsoever. To allow them to bring in that – Well, he allegedly by the way. He's never been convicted. He allegedly committed. He's never been tried for that. He allegedly committed an aggravated battery of which he's never been able to come into court and defend himself on, by the way. To allow the state to bring that evidence in does what they don't – gives them what they don't have. They don't have any DNA evidence putting him in that room. They don't have any eye witnesses put him – putting him in that room. It is so prejudicial to his case, Your Honor, that it does not go to res judicata. The state is attempting to do what they don't have is to put Robert McCoy in that room and there's no evidence to say that he was ever in that room, Your Honor.

THE COURT:

Okay, Mr. Marvin?

MR. MARVIN:

Your Honor, that's not really true. There is evidence of Mr. McCoy being present in that room and that's by the 9-11 tape of Christine Colston and she calls him by name. And he is – the part that he is correct about there isn't no eye witness. There's no eye witnesses because he killed them all. That's what we're here for.

MR, ENGLISH:

Your Honor, the 9-11 tape does not put Robert McCoy in that room. It's just a 9-11 tape. That's all. That's all. It does not put Robert McCoy in that room. It's a 9-11 tape. And quite frankly. Your Honor, the tape speaks for itself, but, again, that tape – that's a question for the jury to determine as to whether or not that tape puts Robert McCoy in that room. Okay? That's what the jury – that's a factual finding for the jury. But in terms of eye witnesses, DNA evidence, they don't have any. They don't have any, and the DA is attempting to introduce – If he introduces that evidence, it is so – it is so – in my opinion, Your Honor, so prejudicial at trial that Mr. McCoy cannot get a fair trial at that particular point. He cannot get a fair trial. I'm going to state succinctly there was no act of violence committed against Yolanda Colston on 5-05-2008. None whatsoever.

THE COURT:

All right, final response, Mr. Marvin.

MR. MARVIN:

Like I said, Your Honor, to give the jury, the trier of fact in this matter, the whole picture of why the state believes, I know Mr. English doesn't believe it, but why the state believes that Robert McCoy went to the Colston's residence that night and killed numerous people was because of that warrant and his conflict with Yolanda. There is no other reason for him to go to that residence. He didn't live there. He didn't have any belongings there that he was going to retrieve. He didn't have any other reason to go there except to search for Yolanda. And what he – what he intended to do with her, like I said, you can argue both ways. We have the

ability to argue both ways; that he intended to either convince her to drop the battery allegation or he intended to do away with her, too. But that's what caused him to come into contact with these victims on that particular night.

THE COURT:

All right. Give me just a minute please. All right, to the defendant1s Motion in Limine as to the taped statement of Spartacus McCoy the state has already agreed that they're not going to use that statement, so that is granted. As to the prior bad acts of Robert McCoy regarding this evidence that has been argued this morning, I'm hereby allowing that. That does go to res gestae and to the motive in this situation, and I believe that it's very relevant to the trier of fact. And I believe that it will be -- I believe that it does go to res gestae and to the motive in this case, so I'm allowing that to be heard. So to the taped statement of Spartacus McCoy, that is granted. To the prior bad acts, that is denied.

MR. ENGLISH:

I believe the law allows me to take a writ on that ruling, Your Honor.

THE COURT:

Yes sir, I'll allow you to take a writ.

MR. ENGLISH:

And I'll take a writ on that. The other thing, Your Honor, is we filed a Supplemental Motion for Discovery. We just wanted to make sure that we had in the record of evidence that we in no way say that the DA is not providing that to us. But I just want to put in the record at the reviewing the file of evidence that I think

that we – the DA has or may have that we need, and so I filed a Supplemental Motion for Discovery into the record. It speaks to itself and I've talked to the DA about that. Some of the stuff he may have, he may not, Your Honor.

THE COURT:

And you just filed a Supplemental Motion for

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EXCERPT OF JANUARY 4, 2011 TRANSCRIPT RE MOTION IN LIMINE AND PLACING OF JURY EXCUSES ON THE RECORD

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for a list of the names of all witnesses under the Freedom of Information Act and basically producing it to Mr. McCoy. And I don't know if it brings – if he's aware of it. We just became aware of it.

THE COURT:

All right, Mr. English, just one second. Let me get Mr. McCoy just to identify himself for the record so I have him here.

MR. ENGLISH:

Mr. McCoy?

THE COURT:

All right, Mr. McCoy.

MR. McCOY:

My name is Robert McCoy. I stay at 7323 Altus Loop, Shreveport, Louisiana.

THE COURT:

All right, Mr. McCoy. Now Mr. English, I'll let you –

MR. ENGLISH:

May I respond?

THE COURT:

Yes sir.

MR. ENGLISH:

The state is correct. I did file a defendant motion to submit a jury questionnaire as well as a motion for indigent, to declare Mr. McCoy indigent in order for the Public Defender's Office to provide us funds for experts. Mr. McCoy has directed me, Your Honor, not to argue that motion to declare him indigent and to declare him experts of which I refuse to do. I believe that Mr. McCoy, Your Honor, is suffering from some serious mental issues. That is important in this case. I've explained to Mr. McCoy that I will not, unless other order wise by the Court. That is not in his best interest. This is a capital murder case that I am attempting – that I have to move forward in order to defend him if there is a guilty verdict and he face a capital sentencing. Mr. McCoy has ordered me not to do that. I told Mr. McCoy that I'm going to refuse to do that unless the Court here orders me to do otherwise. I believe that those experts are important. Mr. McCoy has filed more motions, Your Honor, other than the ones I think that the state has filed today. I do not adopt those motions. I've asked Mr. McCoy not to file those motions. He's filing them. I do not adopt those motions, so that – Quit moving. Okay. So that if he wants to argue them, he can argue them. I do not believe it's in his best interest to do so. I believe that my client is suffering from some severe mental and emotional issues that has an impact upon this case. Mr. McCoy is not recommending that I take a course of action that I do not believe is in his best interest. That I believe as a lawyer that I have an ethical duty given the ramifications of this case to not follow that advice that I am charged with at the end of the day. I have tried to explain to Mr. McCoy whether he accepts it or not, I'm one of the few people that may be standing between him and a death sentence. And when given – given the ramifications of this case I believe that I cannot follow that advice. I do not – I'm not

asking this Court to continue. The state has provided us with all of the evidence in this case. I have reviewed every piece of that evidence with Mr. McCoy. There's several pieces that I could not review with him we're going to review this morning. I've asked the state to assist me in getting the 9-1-1 tapes available. That's the one piece we would be because I simply was not able to play it on my laptop when I met with him yesterday. So I'm here to argue the motion of the jury questionnaire. I'm asking the Court to declare him an indigent defender. I'm asking the Court to order that Mr. McCoy submit to the experts that are required in a capital murder case in order to defend him. If Mr. McCoy wants to argue those motions, he can argue those motions. I do not adopt those motions. I've asked him not to do that because there may be some statements or documents in there that I believe that may be detrimental to his case given the overwhelming –

THE COURT:

Mr. English, I can't –

MR. ENGLISH:

I'm sorry. – given the overwhelming evidence that is against him. So having said that, Your Honor, I stand to the side.

THE COURT:

Mr. McCoy, before – before I let you say any words, I'm going to stop you right here. Mr. McCoy, I want you to understand, sir, you absolutely have the right to remain silent. Anything you say can and will be used against you in a court of law. This is being recorded, sir. I don't want you to say a word without understanding this. Number two: You have the right to

talk to your attorney, which Mr. English has strongly advised you not to state a word in this courtroom, and have him present with you while you're being questioned or while you're making any statement. Mr. English has strongly advised you not to make any statements. Mr. English is your attorney. He is your attorney and he is here with you and he has strongly advised you not to make any statements. You can decide to exercise these rights at any time before you answer any question or make any statement, sir. If you make a statement I want you to understand the district attorney is in this courtroom listening at this time. These statements are being recorded at this time. Mr. McCoy, if you decide to go forward and make any statements they may be used against you in the court of law and it may be very detrimental to your case. I want you to understand these rights before you even open your mouth because, sir, I am trying to protect your rights. Do you understand those rights, Mr. McCoy?

MR. McCOY:

Yes, Your Honor, I do.

THE COURT:

Did you get that, Madam Court Reporter? Get in front of the microphone. You understand those rights?

MR. McCOY:

Yes, Your Honor, I do.

THE COURT:

You understand that this is a death penalty case, that your life is on the line, that any statement you made may help the state be able to put you to death?

MR. McCOY:

Yes sir, I do.

THE COURT:

Do you understand, sir, that you are telling this Court that you wish to go forward and make a statement if I allow you to make a statement?

MR. McCOY:

Yes sir, I am.

THE COURT:

You understand the ramifications of making these statements?

MR. McCOY:

Yes sir.

THE COURT:

You understand that this may hamper Mr. English in being able to defend you in any way?

MR. McCOY:

Your Honor, I under –

THE COURT:

Mr. Eng – Mr. McCoy, answer my question to that please.

MR. McCOY:

Yes sir.

THE COURT:

You understand, sir, that Mr. English has advised you not to make any statement?

MR. McCOY:

Yes sir.

THE COURT:

You understand constitutionally that you have the right not to make any statements?

MR. McCOY:

Yes sir, I do.

THE COURT:

You understand constitutionally that you're protected from self-incriminating yourself?

MR. McCoy:

Yes sir; Fifth Amendment right.

THE COURT:

You understand that this goes to a jury trial?

MR. McCOY:

Yes sir.

THE COURT:

You understand that that jury trial cannot be waived in any way and that a jury will determine your sentence and your guilt?

MR. McCOY:

Yes sir.

THE COURT:

All right. Mr. English, before – Mr. McCoy, before I allow you to make the statement, Mr. English, I'm going to allow you –

MR. ENGLISH:

Your Honor, I want to state back up on the record, I'm advising Mr. McCoy not to make any statements in this courtroom today, not to argue any motions. It is

my belief after spending my time with Mr. McCoy and my almost 20 years of practice given the overwhelming evidence that is presented in this case or that I have taken over with Mr. McCoy, I believe, Your Honor, that Mr. McCoy is suffering from some severe mental and emotional issues. I understand that there was a sanity hearing done, but I need capital experts who are trained in these cases to evaluate Mr. McCoy. Mr. McCoy has refused to do that. My last statement is, Your Honor, because of that I'm advising Mr. McCoy I do not believe that Mr. McCoy is capable of making value judgments in this case about his defense and I ask him and I want to state on the record again, Your Honor, that he not make any statements in this courtroom. Now I'm through.

THE COURT:

Mr. McCoy, I'm now letting you make a statement at this time because of your representations by Mr. English. Give me just a minute. Mr. Marvin, any statements that you would like to make at this time, sir.

MR. MARVIN:

Your Honor, I don't really know where we're going with this, but I would just submit we can take up the Motion for the Jury Questionnaire and get that out of the way. I don't think it requires much of a response because we're not objecting to it. Number two, the motion for the other matters, the mitigation experts that he's referring to, I think Mr. English has made it clear that he intends to argue for those funds and they're available. I've talked to Ms. Smart of the Public Defender's Office and I don't see how in the world Mr. McCoy could be prejudiced by the granting of these two unopposed motions. And then that leads us to the only other motion that I'm aware of was the discovery

motion that he filed in proper person and I think we can address that in short order. And that's the only other motion that I'm aware of. I've looked at the clerk's office computer screen and we don't see any other motions, but we can deal with these three motions pretty quickly. If Mr. McCoy wants to make a statement after the Court has ruled on those motions, he can do so.

THE COURT:

All right. Mr. Marvin, the state does not object to the jury questionnaire form that Mr. English has submitted?

MR. MARVIN:

I don't object to it but I would submit this, Your Honor. There is a lot of questions that are just general questions about you know the person employment and things like that, and I personally like to use that opportunity to develop a rapport with the jury, with that particular juror. And if I get into asking some of the same questions that are on here, I do not – I mean I don't intend to object to Mr. English's questions if he's repetitive for a question that's in here and I would expect the same courtesy. But other than being lengthy you know is all I'm pointing out to the Court that it may during our time with the jury, the only time that we're allowed to converse back and forth with the juror, is during voir dire and I would – I do not want this to say for the Court or to opposing counsel to say, no, no, no, you can't answer that question. You can't ask that question. But having said that, I don't oppose to anything he submits as far as a questionnaire.

THE COURT:

Mr. English, and let me ask you this, the Court has proposed a jury questionnaire which comes out of the capital trial book.

MR. ENGLISH:

Your Honor, I'm – to be quite candid with you, if – what the Court proposes I will review. I would not quibble with the Court about that questionnaire.

THE COURT:

The only – the only reason I'm stating this to Mr. English, and I'll let you get in front of the microphone, –

MR. ENGLISH:

Yeah.

THE COURT:

– this has come out of the capital trial book from the State of Louisiana. It's been one of the questionnaires. It is a lengthy questionnaire that has been tried and been supported by case law and been allowed by the case law. It goes through numerous of these questions. Now one of the questions that you asked about in your questionnaire was dog fighting and other things of that nature.

MR. ENGLISH:

It needs to be amended, Your Honor.

THE COURT:

Okay.

MR. ENGLISH:

So Your Honor, I would, you know, –

THE COURT:

Would you be agreeable –

MR. ENGLISH:

Yes.

THE COURT:

– to allow the Court to use the jury questionnaire –

MR. ENGLISH:

Yes.

THE COURT:

– from the capital – Louisiana Capital Trial Notebook?

MR. ENGLISH:

Yes, Your Honor, with the caveat that with the Court and if the DA does not oppose that I may have some opportunity to amend or add something that I believe that may be important. Is that –

THE COURT:

As long as you do that – Let me do this, Mr. English, so that I can make sure that –

MR. ENGLISH:

Right.

THE COURT:

– we – because I intend on giving these questionnaires out –

MR. ENGLISH:

This week.

THE COURT:

No sir. I intend on giving these questionnaires out when we meet on those dates that we've discussed, but I would ask that you amend, if you have any amendments, that that be done by next Tuesday.

MR. ENGLISH:

That's fine, Your Honor.

THE COURT:

And that would be January the 11th.

MR. ENGLISH:

That's no problem, Your Honor.

THE COURT:

Is that agreeable, Mr. Marvin?

MR. MARVIN:

Yes sir.

THE COURT:

Okay. Now the next motion is your motion for the indigency and for mitigation experts; is that correct, Mr. –

MR. ENGLISH:

That's correct, Your Honor.

THE COURT:

All right.

MR. MARVIN:

Your Honor, if I could, I know it's his motion but I spoke with Pam Smart this morning. She informed me that there does need to be a declaration of indigency upon Mr. McCoy by the Court. After that, the court orders really don't matter. It's simply an application to

the state public defender's office for funds. And if they feel – if Mr. English feels that he's been shortchanged or not given enough funds for a certain expert, he certainly can come back to the Court and ask for whatever relief. But she has informed me that the state public defender's office is not opposing this request. I'm sure they have limits, I don't know what they are on the amount, –

THE COURT:

All right.

MR. MARVIN:

– but they – until we get to that point you know all that's required is the declaration of indigency.

THE COURT:

Okay.

MR. ENGLISH:

That's correct, Your Honor, and the state public defender's office has advised me and worked with me and provided me with a list of experts, so I'm confident that we can work that out. I must state again my client has advised me not to take this action, but I am not listening. I am at this point, Your Honor, opposing that.

THE COURT:

Mr. English, you are – Mr. English, you are Mr. McCoy's attorney at this time. I will therefore declare him indigent at this time, order that the appropriate experts be hired based on the basis of your statements to this Court and based on no opposition by the State of Louisiana at this time.

MR. ENGLISH:

All right.

MR. MARVIN:

Thank you, Your Honor.

MR. ENGLISH:

Thank you, Your Honor.

MR. MARVIN:

Your Honor, there is a motion that's in the form of the clerk converted to a subpoena duces tecum to our office basically asking for a list of the names of all witnesses under the Freedom Information Act and Code of Criminal Procedure Article 716. It appears to be just a blanket discovery motion. We have provided open file discovery to Mr. English even to the extent that we're loaning him one of our personal computers to listen to some DVDs or CDs, and we have open file discovery in this case as we have in every other case in my office. So we would ask that that subpoena be deemed satisfied as Mr. McCoy's attorney – through Mr. McCoy's attorney.

MR. ENGLISH:

May I just state, Your Honor, the state – I have reviewed all of the discovery that the state has provided me. It appears to be thorough. Everything that I've requested that they give me I have received. I would only ask of it is is that I think that there may be some, for a lack of better words, the correspondence from particular jailhouse snitches in this case. I would ask that the DA would give me copies of everything that they have in that particular instance. At this particular point, I'm satisfied with what the district attorney has provided me. It has been very thorough. I think it lays out quite clear what – I have a full understanding at

this point unless the district attorney is hiding something from me and I don't know any reason why he would in this particular case be hiding anything from me. It is thorough and I believe at this point, Your Honor, I have everything. They've satisfied my discovery request.

THE COURT:

All right. Mr. Marvin, any objection to providing him any other discovery?

MR. MARVIN:

No. We got a letter yesterday from some other inmate offering to help us with this case. We don't need his help. We don't intend to respond to it. We showed that letter to Mr. English yesterday afternoon, but if we get another correspondence like that we'll certainly provide it.

MR. ENGLISH:

I'd just like to have a copy of it, that's all.

MR. MARVIN:

That's fine.

THE COURT:

Mr. English, if you believe that the subpoena has been satisfied at this time, if you need to file any additional need for discovery or if the Court can assist you in any need for discovery, you can file the appropriate motion. I would ask that it just be filed

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EXCERPT OF JANUARY 24, 2011 TRANSCRIPT RE MOTION FOR CONTINUANCE

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MONDAY, JANUARY 24, 2011

MOTION FOR CONTINUANCE

MR. MARVIN:

Your Honor, this is docket number one-eight-three-five-seven-two (183,572), State versus Robert McCoy.

THE COURT:

I'm sorry?

MR. MARVIN:

I meant — I'm sorry, one-six-three — my motion in the file has the wrong docket number but you do have that, Madam Clerk?

MADAM CLERK:

I have the correct one. We put the correct one on the —

MR. MARVIN:

If you'll correct that for me.

MADAM CLERK:

Yes, sir.

THE COURT:

Okay, thank you.

MR. MARVIN:

Your Honor, the state –

THE COURT:

And let me — let me — excuse me just a second, Mr. Marvin. Mr. English, you're present with —

MR. ENGLISH:

Yes, Your Honor.

THE COURT:

And, Mr. McCoy, you are present in the courtroom, is that correct?

MR. MCCOY:

Yes, sir.

THE COURT:

All right, thank you, sir. All right, I'm sorry, Mr. Marvin, I hate to interrupt you, sir.

MR. MARVIN:

Your Honor, I believe sometime approximately in late December Mr. English on Mr. McCoy's behalf filed a motion for — to — to obtain funds to hire mitigation witnesses. And that act — that motion was heard and decided on January the 4th. And I — but prior to that I had talked to Pam Smart, who's the head of the public defender's office, to ask them about their position on this motion in which she informed me that they didn't object to it; I reported back to the Court to the — to that affect. What Ms. Smart further told me was that it was necessary for the Court to declare Mr. McCoy indigent. And after that Mr. English, as his private attorney, could make an application for funds directly to the state public defender's office. But that declaration of indigent — indigency was, I guess, critical or even mandatory before the state P.D.O. office would release those funds. So at that January 4th hearing the Court

declared him to be indigent. And I assume Mr. English has made his application for those funds and there may be some more discussion about that later this morning. After that I became — I — I was aware but I didn't realize that Supreme Court Rule 31 provides that in any capital case in which a defendant is determined to be indigent the Court shall appoint no less than two attorneys to represent the defendant. And there's further language in that rule but that declaration of indigent — indigency for the purpose of his private attorney getting P.D.O. funds for his witnesses raises an issue or a potential issue on our part. That — now that Mr. McCoy has been declared indigent is the Court under any obligation to appoint no less than two attorneys? And I — and to argue that, I guess full circle, does that mean that, the Court has to appoint two more lawyers? Because he's certainly got a right to Mr. English as his private attorney. But I know that the reason the Court declared Mr. McCoy to be indigent was not or had nothing to do with appointing him extra counsel. But it's an issue that we wanted to — to flush out prior to the trial of this matter. Our research doesn't reveal any cases in where — in most death penalty cases there is the public defender's office or the CAPOLA or one of their conflict attorneys as counselors. There's not that many cases where there's private counsel in a death penalty case, unfortunately. But our research indicated the closest we got to it was State versus Walter Koon, which is a Louisiana Supreme Court case 704 So.2d 756. And in that case Mr. Koon had two court appointed lawyers and one of them after she was appointed she just didn't do anything. She didn't take any part in the guy's defense. Didn't meet with the defendant. Didn't interview any witnesses. Didn't do anything. And so about two days before the trial of that matter she asked to be relieved. And the Court, and the defendant, and

his primary counsel discussed all this, and in that case Mr. Koon, the defendant, actually stepped up and said, I would rather waive her appearance, Your Honor. And that that disposed of that issue. But in — when it came up on appeal this came back out as an — as an issue. And the Court said — cited that rule but they said: (quoted as read) "However, as other sections of this rule make clear this does not give rise to affirmative right to multiple attorneys in capital trials, see Rule 31R." And it quotes: "The Rule shall not — this Rule shall not be construed to confer substances or procedural rights in favor of any accused beyond those rights recognized or — or granted by the United States Constitution, Louisiana Constitution Laws of this state and in the jurisprudence of this Court." And they just kind of disposed of it by saying whatever -whatever the — the matter that the defendant waived it. And so we filed this motion to — to kind of just flush this issue out pre-trial and get Mr. English and/or Mr. McCoy's position. Now I do think, I don't have the record, the clerk record in front of me, and correct me if I'm wrong, Mr. English, didn't another attorney enroll as co-counsel with you?

MR. ENGLISH:

Yes, he is. He's been help — assisting me and advising me on the case, yes, he has. But

MR. MARVIN:

Who's that?

MR. ENGLISH:

Attorney, James Gray.

MR. MARVIN:

No, that's not the one I had. I thought there was a motion –

THE COURT:

Didn't Mr. —

MADAM CLERK:

Carlos.

THE COURT:

Carlos Prudhomme? Wasn't he –

MR. ENGLISH:

Oh, Carlos, I didn't realize that Carlos was

MR. MARVIN:

Yeah, he —

MR. ENGLISH:

Carlos was.

MR. MARVIN:

He and — he filed a written motion that I found but to my knowledge he's never –

MR. ENGLISH:

He's never —

MR. MARVIN:

— participated.

MR. ENGLISH:

He's not been involved in the case; I apologize.

MR. MARVIN:

But if he has co-counsel — private co-counsel then I think that — that may put this to bed, but I think —

MR. ENGLISH:

But I can — Mr. — Mr. Prudhomme will not be helping me handle the trial. So I want to be clear about that. I mean, -

MR. MARVIN:

But, Mr. —

MR. ENGLISH:

— Your Honor —

MR. MARVIN:

Okay.

THE COURT:

James Gray will be helping you in this trial?

MR. ENGLISH:

He — he will not be here for the trial, Your Honor. He will not be here for the trial either.

MR. MARVIN:

Okay.

MR. ENGLISH:

They — they been helping — Mr. Gray's been helping me — just advising me on the case.

THE COURT:

All right.

MR. MARVIN:

Obviously the purpose of the rule, I mean, the intent of the rule in having two attorneys is, if one attorney gets up there in the guilt phase and the jury finds the defendant guilty there is a theory out there that that attorney has lost his quote "creditability" close

quote with the jury. And then another attorney should step up to handle the — the penalty phase. I know that's not absolute and there are situations where the — the attorney may not have necessarily loss creditability with the jury but that's the theory behind the rule in — in our opinion. But because of that declaration of indigency that — that everybody agreed to, I didn't what to, you know, box our — the state into — to later come back and allow Mr. McCoy to complain that he did not get second counsel. But if — but if Mr. English has another counsel that intends to participate that, again, that may resolve that.

MR. ENGLISH:

I do not have another counsel that intends to participate at trial, Your Honor.

THE COURT:

All right.

MR. ENGLISH:

I mean, I'm comfortable moving forward, that's up to Mr. McCoy, Your Honor. I know what the facts of this case is. So he may want to address that.

THE COURT:

Mr. McCoy, and I just want to be specific when I tell you this. And I'm advising you, I don't want you to talk anything about this case. Anything about the merits of this case in anyway. I don't want you to talk anything other than the counsel on this case. Because this is being recorded. I want you to understand that. You have an attorney. You have the right to consult with that attorney. You have the right to remain silent on all things and I want you to understand that, I'm trying to protect your rights, Mr. McCoy. So I mean, I'm do-

ing everything I can. I don't want you to talk about any merits of this case.

MR. MCCOY:

I need to address the record, Judge Cox.

MR. ENGLISH:

You — wait — wait you haven't acknowledged yet. Do you understand what he's saying?

MR. MCCOY:

I — I —

MR. ENGLISH:

Only about the — only about the lawyer.

MR. MCCOY:

I'm — no, sir.

THE COURT:

All right.

MR. MCCOY:

I'm fully competent upon understanding everything Judge Cox has to say to me, sir.

MR. ENGLISH:

I'm talking –

THE COURT:

Mr. McCoy, and I'm being real specific, you have counsel with Mr. English. All right, you understand what Mr. Marvin has stated, is that correct?

MR. MCCOY:

I understand everything Mr. Marvin has stated, Your Honor.

THE COURT:

Okay. I only want you to address that issue.

MR. MCCOY:

I need to address more than that, Judge Cox. I will — I would like to –

THE COURT:

Can we address that issue first, before we address any other issue, Mr. McCoy?

MR. MCCOY:

Yes, sir.

MR. ENGLISH:

And — and — and, Your Honor, let me — let me put on the record, again, I'm going to strongly advise Mr. McCoy to not make any statements in this courtroom about this case other than the issue as to whether or not what that Mr. Marvin has raised.

THE COURT:

Okay.

MR. ENGLISH:

Other than that, Your Honor.

THE COURT:

All right, Mr. English.

MR. ENGLISH:

Okay.

THE COURT:

This — and just to make sure that you understand your rights. You have the right to remain silent during all proceedings. You have the right to have an attorney

present with you. If you cannot afford an attorney one will be appointed to represent you but in this case you have Mr. English which is your attorney and he's advising you not to talk. You don't have to answer any questions. You don't have to make any statements in this courtroom at all. You can advise through your attorney and not make any statements. Anything you say can and will be used against you in the court of law. And I want you to understand this is all being recorded. That anything you say Mr. Marvin can use against you at your case. Or it can be used against you at your case. Do you understand those rights, Mr. McCoy?

MR. MCCOY:

Yes, sir, I fully understand it, Your Honor.

THE COURT:

Okay, Mr. McCoy, I am, again, advising you to list — listen to your attorney but you may proceed but I would like to just address the co-counsel situation if possible at this moment then I will let you proceed after your attorney talks to you. Mr. English?

MR. ENGLISH:

Your Honor, is it possible me and Mr. McCoy just to have three minutes outside of the courtroom?

MR. MCCOY:

I don't want to talk, Your Honor. I need to proceed and address something on the record, Your Honor.

THE COURT:

Mr. McCoy, can I let you — do you want to talk to Mr. English outside of the presence of the Court? Would you —

MR. MCCOY:

If — if I do, Your Honor, I still want to address the matter to the Court.

THE COURT:

I'm going to let you — I'm going to let you address whatever you want to address on the record, but I would feel better if you go and talk to your attorney first.

MR. MCCOY:

I will, Your Honor.

THE COURT:

All right, thank you.

MR. ENGLISH:

Thank you, Your Honor.

THE COURT:

Three minutes or five minutes. Mr. English?

MR. ENGLISH:

Yes, Your Honor?

THE COURT:

All right. They'll let you in in just a second.

(COURT IN BRIEF RECESS)

(COURT BACK IN SESSION)

MR. ENGLISH:

Your Honor? Your Honor, I have spoken to Mr. McCoy. It is my understanding that if the Court appoints a co-counsel, that co-counsel will be the public defenders — would be a public defender. Mr. McCoy has — has — has stated to me that he does not want

the public defender's office appointed as co-counsel in this case. Okay. I want to state for the record, Your Honor, as we put on the record, when Mr. McCoy and I first spoke. I'm not capital certified; we waived that. I have — I have — I am confident, Your Honor, that if I'm allowed to have all the tools that I can adequately give him a defense. But — and I have other lawyers who are advise — Ms. Pam Smart and other lawyers are advising me on — on this case and — and I feel confident moving forward. But Mr. McCoy has advised me, Your Honor, that he does not want a public defender appointed to his case.

MR. MARVIN:

Your Honor, that's fine; Mr. McCoy just makes that declaration. I think in the State versus Koon, that solves it.

THE COURT:

All right, Mr. McCoy, you've heard that statement made by Mr. English, is that correct?

MR. MCCOY:

Yes, sir.

THE COURT:

And is that your declaration? That you do not want another co-counsel appointed in this case?

MR. MCCOY:

Well, not a public defender co-counsel, Your Honor, because on March of 2010 –

THE COURT:

Mr. McCoy, just a second.

MR. MCCOY:

— it was established that Mr. English was going to put a legal team together, in your courtroom, because it validated that he was not legal certified. And I have the judicial documents before me.

THE COURT:

Yes, sir.

MR. MCCOY:

And due to the fact that judicial document it was on record. Mr. English made it known to me that he was going to obtain an attorney from New Orleans. Now it comes to play, Your Honor, that Mr. English wants to appoint a public defender to make — a public defender is not going to properly represent me. I've had problems with the public defender's office, Your Honor, from day one.

MR. ENGLISH:

Okay, stop talking. You've made your point; stop and listen.

MR. MCCOY:

No. No, sir.

MR. ENGLISH:

Stop, please.

MR. MCCOY:

No, sir.

THE COURT:

Mr. McCoy?

MR. ENGLISH:

Stop, please, okay?

THE COURT:

Mr. McCoy? The only option that I would have, if I appointed anyone, would be the public defender's office.

MR. MCCOY:

I can't get a conflict of interest attorney, Your Honor? Outside the public defender's office? From what I understood, Your Honor, I am entitled to a conflict of interest attorney, Your Honor.

MR. MARVIN:

Your Honor, there's never been any conflict of interest.

THE COURT:

Not that I know of.

MR. MARVIN:

I mean in this case.

THE COURT:

Mr. McCoy, there has not been a conflict of interest. The public defender's office would have been appointed in your case and has been appointed in your case. You retained private counsel through Mr. English.

MR. MCCOY:

Yes, sir.

THE COURT:

And then you stated that you wished to waive his capital certification on the record. The other side of that is that if this Court were to appoint anyone the Court would have to appoint the public defender's office. That's the only persons that the Court could ap-

point. There has not been a conflict of interest. The public defender's office, as I understand, has always been willing to represent you and been willing to proceed forward. You retained private counsel and Mr. English has been your private counsel. So the Court would only have the option to appoint the public defender's office. If the public defender's office felt that there was a conflict in any way then they would appoint conflict counsel at that point. But I would have to go back to the public defender's office to appoint someone as a co-counsel, Mr.McCoy.

MR. MCCOY:

Okay, Your Honor, on judicial document of February 11, 2010, the state supposed to -appointed Mr. Randall Fish as a conflict of interest attorney. And when I presented that to the judicial board Ms. Pam Smart validated Mr. Randall Fish is not a conflict of interest attorney.

THE COURT:

Well, Mr. Fish is with the public defender's office.

MR. MCCOY:

I understand, but Mr. Fish is not a conflict of interest attorney, Your Honor.

THE COURT:

Mr. McCoy, again, there has been no conflict with the public defender's office representing you. So I would have to appoint the public defender's office. If they felt that there was a conflict of interest they would appoint a conflict of interest attorney at that time and that is how it would work.

MR. MCCOY:

I — I fully understand, Your Honor. But do you remember, Your Honor, when I first had Ms. Pam —

THE COURT:

Mr. McCoy, I'm telling you how it works.

MR. ENGLISH:

Your Honor, I will discuss this with Mr. McCoy. I will discuss further, I think he understands, I will discuss this further with Mr. McCoy, Your Honor.

MR. MCCOY:

Okay. I — okay. I understand, Your Honor. I have further things that I want to address to the record.

MR. ENGLISH:

Please, Mr. McCoy. Mr. McCoy, please.

THE COURT:

Mr. McCoy, I will let you discuss those in a minute.

MR. MCCOY:

Okay.

THE COURT:

Do you wish this Court to appoint a public defender office attorney as a second attorney? That is up to you, Mr. McCoy.

MR. ENGLISH:

It's up to you.

MR. MARVIN:

And, Your Honor, I spoke with Ms. Smart and obviously the Court's aware of her capabilities, so.

MR. ENGLISH:

I would — Your Honor, I would not object to a co-counsel being appointed but that's up to Mr. McCoy.

MR. MCCOY:

Your Honor, I'm undecided at this moment.

THE COURT:

Sir?

MR. MCCOY:

I'm undecided at this moment, Your Honor. That's a — that's a hard decision to make, Your Honor. This decision that I make, Your Honor –

THE COURT:

Mr. McCoy?

MR. MCCOY:

— will be a decision that will mitigate the rest of my life, Your Honor.

MR. ENGLISH:

Your Honor, may I — may I — may I speak? May I speak?

THE COURT:

Yes, sir.

MR. ENGLISH:

I think in the order of — to make sure that we move forward with this that the Court appoint a public defender as a second counsel in this case, Your Honor.

THE COURT:

Mr. Fish?

MR. FISH:

Your Honor, on behalf of the public defender's office we're going to certainly object –

MR. ENGLISH:

Okay.

MR. FISH:

— to being appointed as co-counsel.

THE COURT:

On what bases, Mr. Fish?

MR. FISH:

Your Honor, if Mr. McCoy –

THE COURT:

Mr. Fish, I need you next to a microphone.

MR. FISH:

Mr. McCoy has private counsel –

THE COURT:

Mr. Fish, I need you by a microphone, please.

MR. FISH:

Mr. McCoy has private counsel, Your Honor, and this —

MR. MARVIN:

Your Honor, I guess on behalf of the state the Rule — the Supreme Court Rule 31 that we're talk — talking about clearly, clearly concerns situations where there is a court appointed indigent defender in a capital case and the rule states that they shall appoint two attorneys. If it's not applicable to a situation where there's a private attorney or I would submit that we don't believe that it applies. Despite the fact we filed

this motion to situations where there is private counsel. And Mr. McCoy whatever displeasure he has with Ms. Smart at the public defender's office, I'm not aware of what his reasons are nor is it relevant, I think. But he has chosen Mr. English as his attorney and, you know, made a waiver of certain things regarding Mr. English's representation. And again, we just don't believe that the rule applies.

MR. ENGLISH:

Could I — let me — let me just say because the public defender's office objects, Your Honor, I withdraw that — that request.

MR. FISH:

I — I — our office —

MR. ENGLISH:

Okay, I mean, I will — because they object and I don't have any problem with them objecting by the way, I withdraw that request. So, I think that takes care of that.

THE COURT:

Okay, then that request has been withdrawn.

MR. MARVIN:

Your Honor, if Mr. McCoy is comfortable proceeding forward with Mr. English as his attorney just like in State versus Koon, if he just simply states, I waive the right to second counsel under Rule 31 that's fine. This issue's over with and we can move on to whatever Mr. McCoy wants to bring up next.

(MR. ENGLISH AND MR. MCCOY WHISPERING OFF RECORD)

MR. ENGLISH:

Your Honor? Your Honor, Mr. McCoy wants me to put on the record I have other lawyers who are advising me on this case, including the public offender's office has been very — has been very helpful, Your Honor, in advising me on this case. I will be the only lawyer that will be handling the trial, Your Honor, but in terms of — of helping prepare me for this case, I have — I have relied on both Pam Smart, James Gray, the public — the state public defender's office, and — and several mitigation experts, Your Honor. I feel very comfortable, I'm -I've been doing this for twenty years. If I wasn't feeling comfortable that I was — where I'm at in this case and that I can handle this case, Your Honor, I would be up there right now filing a motion to withdraw out of this case. I want to put on the record that I — that I think we are — we are — the only issue is what I discussed with the case and we discussed moving forward. And I'm putting it on the record and I believe Mr. McCoy is now — is now going to state, Your Honor, that he waives appointing a second person to the case. Correct, Mr. McCoy?

MR. MCCOY:

You're correct.

MR. ENGLISH:

Okay.

THE COURT:

That is correct, Mr. McCoy?

MR. MCCOY:

Yes, sir.

MR. MARVIN:

That's fine.

THE COURT:

All right, then that issue has been resolved.

MR. MARVIN:

All right.

MR. ENGLISH:

Now may I — may I take my shot, Your Honor?

THE COURT:

Yes, sir, Mr. English.

MR. ENGLISH:

Your Honor, as — as the D.A. has so eloquently stated we have had to declare Mr. McCoy to be an indigent in order to get experts appointed in this case. Simply because Mr. McCoy nor his family has the finances to — to fully fund this case. I'm essentially representing Mr. McCoy for free, Your Honor. We filed a motion to declare him to be indigent. It was filed in early December, the Court did not hear it until early January the 4th. Worked diligently with the state public defender's board to get the experts in place. We've gotten them in place, but Your Honor, they have indicated to me despite my pressing them that they cannot be ready for trial.

THE COURT:

Who are your experts, Mr. English?

MR. ENGLISH:

Mr. John Craft and Dr. Mark Vigen. Okay. Mr. John Craft is a mitigation specialist; will be here working with me on mitigation issues. Dr. Mark Vigen, as you're aware, Your Honor, he was actually on Mr. McCoy's sanity commission. The D.A. waived — the district attorney waived him agreeing to come on board to try to facilitate this. But having said this — that, Your Honor, they cannot be ready. Given the fact that this is a capital murder case and given what the facts of this case is, Your Honor, I'm moving, I reluctantly, reluctantly, on the advice of those two mitigation experts, I'm moving for a continuance in this case, Your Honor. I — I — I apologize to the Court. I want this case moved forward but I — but I -but I — in order to protect my client, I have to follow the advice of those two mitigation experts, Your Honor. And I'm respectfully requesting that this matter be continued to a future date to allow them to do what they need to do.

THE COURT:

Mr. Marvin?

MR. MARVIN:

Your Honor, we object to a continuance. There was a scheduling order issued by the Court many months ago. Aside from that scheduling order I don't know how many, I'll phrase admonishments that the Court's given both me and Mr. English regarding the calendar of this matter. And I know Mark Vigen, I don't know John Craft, I — to my understanding John Craft is a person that works for the state public defender's board that has some control over the disbursement of funds. I don't know that he's —

MR. ENGLISH:

I'm not — I'm not — I'm sorry, he's right, Your Honor, Dr. Craig Forsyth, I'm sorry, I'm moving Dr. Craig Forsyth is the other mitigation expert. He's correct; Mr. John Craft is working with me in retaining the expert. Dr. Craig Forsyth out of Lafayette, Louisiana is my other mitigation specialist, Your Honor.

MR. MARVIN:

Okay. Well, that being the case, I have not heard from either of those two people, nor has the Court to my knowledge, about their ability to be ready in February. But now the state has the scheduling order that the Court issued to -to us. Seemed to be pretty much absolute and I think that we need to stick to it. And we'll be ready for trial on February the 7th.

MR. ENGLISH:

Your Honor, let me just add, I don't want to drag this out, let me just add one other thing. I came into this case late. Normally lawyers have several years to prepare for a capital murder case, because capital — This is not a routine case. This is not a second-degree murder case or this is not a manslaughter case. This is a capital murder case. And there are a lot of moving parts to this case. And based upon that, Your Honor, it's just pulling all of this together. This is the ultimate and I just believe that Mr. — that it would — that - that to move forward without those mitigation experts, Your Honor, would almost certainly dictate the outcome of this case. I think it would dictate the outcome of this case before it even starts, Judge. That's all I have to say on that, Your Honor.

THE COURT:

Mr. Marvin, any other response, sir?

MR. MARVIN:

Your Honor, I believe Mr. English enrolled back in March of last year, which is just about a year ago, and so to us that's plenty of time to be prepared for any type of case. And we're very much aware that this is a death penalty case, but a year is a long time. That's all we have.

THE COURT:

Mr. McCoy, I will advise you again, like I've advised you all morning, but I'm going to let — Mr, English is your attorney.

MR. McCOY:

I understand, Your Honor, but —

THE COURT:

You understand all of your rights which I've stated to you a hundred times.

MR. McCOY:

Yes, sir.

THE COURT:

And I mean I know you want to speak, sir —

MR. McCOY:

I understand.

THE COURT:

— but I'm doing everything I can to protect your rights, sir.

MR. McCOY:

I understand, Your Honor.

THE COURT:

And after I've warned you about all those rights you still wish to make a statement, is that correct?

MR. McCOY:

Yes, I do, Your Honor.

THE COURT:

Mr. English, I have advised him. I know that you have advised him on the record.

MR. ENGLISH:

Let's go, Your Honor. Let's go.

THE COURT:

All right. Mr. McCoy —

MR. McCOY:

Okay.

THE COURT:

— you've heard the nature of the argument made by Mr. Marvin and by Mr. English. I will let you address that if you want to address it.

MR. McCOY:

Okay. Your Honor, first and foremost, I want to address to the Court — I want to bring proof of evidence, Your Honor. And I want to -yes, sir, proof of evidence. I want to validate some things on the judicial docket here today. Your Honor, on the evidence docket of the Bossier City Police Department of property evidence there has been, from what I've last heard, a DVD of the 911 call. The evidence log, Your Honor, is here before me. If the bailiff would assist in giving you a copy, the DA a copy and my attorney a copy that I have here and provided here today, Your Honor, it will validate, Your Honor, that this is not a 911 DVD. It was a

911 cassette tape that was given to Lieutenant — or Detective Darren Barclay on 5-5-08. And two years from now we have some type of DVD the public defender — I mean the District Attorney's office has came up with. You can't get a recording from a cassette tape, Your Honor, to a DVD. It has to be a cassette tape to a cassette tape or a DVD to a DVD. The property log is right here, Your Honor, that Mr. Schuyler Marvin had entered into the record a DVD — a burnt DVD of a 911 call, Your Honor. But judicial records or evidence validate different. And not only that, Your Honor, I have also validated on court docket — on court minutes when I spoke to you about retaining or subpoenaing Ms. Shonda Stone, subpoenaing FBI Agent J. T. Coleman, you told me I didn't go through the proper procedures. Your Honor, from the basic understanding of Criminal Code of Procedure and from what I understand out of the Criminal Code of Procedure book, Your Honor, I'm entitled to subpoena anybody that's going to validate, you know, for my witness aspect on my behalf. And Ms. Shonda Stone and Mr. J. T. Coleman are linchpins to my case. And you validated on record when I became my own attorney that I couldn't subpoena these people, Your Honor, but to the best of my knowledge, Your Honor, I can subpoena –

THE COURT:

I didn't deny you subpoenaing them, Mr. McCoy.

MR. McCOY:

You quashed the subpoena, Your Honor. You — you allowed Mr. Marvin to.

THE COURT:

Mr. — Mr. McCoy, I did not deny you subpoenaing them. There is a proper procedure that you have to follow to be able to subpoena an FBI agent and a sitting judge. I did not deny you your subpoenas, sir. I just said that you had to go through the proper procedure. You did not properly subpoena those witnesses. You are still entitled to properly subpoena those witnesses through your attorney. You're still properly able to subpoena those witnesses through your attorney, sir.

MR. McCOY:

And I validated that to Mr. Larry English and Mr. Larry English told me that I cannot subpoena a sitting judge. And I know that is very contrary to the record.

THE COURT:

Mr. — Mr. McCoy, you are being advised by Mr. English on that, but I —

MR. McCOY:

I understand, but –

THE COURT:

If proper procedure is followed, Mr. English will follow your instructions, or not follow your instructions, based on his advice.

MR. McCOY:

But Mr. English works for me, Your Honor.

Mr. English is –

THE COURT:

I understand that, Mr. McCoy.

MR. McCOY:

— required to follow the instructions that I give Mr. English, Your Honor.

THE COURT:

I understand that, Mr. McCoy, but that's between you and your attorney.

MR. ENGLISH:

Your Honor, I need to state something on the record.

THE COURT:

Yes, sir.

MR. ENGLISH:

I believe that Mr. McCoy has severe mental issues.

MR. McCOY:

No, sir, that is not going to work on the record, Your Honor.

MR. ENGLISH:

I — I believe — I believe –

THE COURT:

Now, wait a minute, Mr. McCoy.

MR. ENGLISH:

Let me finish.

THE COURT:

Mr. English, I'm going to let —

MR. ENGLISH:

Let me finish. Let me — let me — let me - - let me –

THE COURT:

— Mr. English talk and then you.

MR. ENGLISH:

Let me finish, Your Honor. I believe Mr. McCoy has severe mental issues. Mr. McCoy has made statements to me that has caused me to have some concerns even though I know there's been a sanity commission been put in place. I'm going to reiterate to the case — the Court again,Your Honor, I believe Mr. McCoy has severe mental issues. That is a mitigating factor in this case as the reason why my motion to continue to allow Dr. Mark Vigen to do a full evaluation of him, Your Honor, to bring those issues forward. Mr. McCoy has made statements to me, Your Honor. He is — he is irrational. I cannot — He's asking me to do and — to do things which I — I cannot do that goes to counter what his interests are in this trial. I believe, Your Honor, it is imperative that this Court grant me a continuance so that I can have Mr. McCoy evaluated in some detail by Mark Vigen to present that evidence as mitigating facts in this case, Your Honor. We're all in this courtroom. It is what it is. All of us in this courtroom, we had an opportunity to evaluate Mr. McCoy, Your Honor. I have — I have tried to give Mr. McCoy the best counsel I can. Mr. McCoy, Your Honor, continues to make statements that are irrational. He continues to ask me to do things, Your Honor, that if I followed his advice would almost certainly lead to a conviction and a jury issuing the death penalty in this case. That is the reason why I am asking Mr. McCoy — Your Honor, for a continuance in this case given that — given that Mr. McCoy has exhibited very bizarre behavior to me that warrants being put -warrants being further evaluated, Your Honor, and — and there are mitigating circumstances in this case.

MR. McCOY:

And, Your Honor —

THE COURT:

Go ahead, Mr. McCoy.

MR. McCOY:

Your Honor, to address that matter, Mr. English is putting on the judicial record that there is something wrong with me and I defer that to Your Honor. Let me share what my problem is with Mr. English, Your Honor, and what my problem will be judicially advising the Court. When I first hired Mr. English, Mr. English told me that they had on April the 28 of 2010, when they did — when we came into your courtroom –

MR. ENGLISH:

I'm advising Mr. McCoy not to –

MR. McCOY:

No, no, no.

MR. ENGLISH:

I'm going to — I'm going to advise Mr. McCoy, Your Honor, not to discuss conversations between me and him; that it will go to undermining his case; that the District Attorney is sitting here; that it's on the record. I'm going to advise him not to do it, Your Honor.

THE COURT:

Mr. McCoy, you — Mr. McCoy, please, listen to me.

MR. McCOY:

Judge Cox, is this —

THE COURT:

Mr. McCoy, please listen to me. You're fixing to reveal attorney/client privilege. You're fixing to put this all on the record and this is going to seriously — this is — Sir, if ever a person needed to exercise their rights to be quiet and to use their right to remain silent, this is one of those cases, sir. And I am — Mr. English has advised you. I'm advising you. I cannot stop you from making a statement, Mr. McCoy.

MR. McCOY:

But, Judge Cox, this — this really needs to be heard though. This really needs to be put on record, not just for court documents but for validation. When your own attorney, Your Honor, tells you that the District Attorney brung a plea saying that you got your fingerprints on the gun; that the victims' blood is on your clothing; that other — other mitigating aspects happened when it comes to evidence that there is no victims' blood on your clothing; that there's no fingerprints on the gun; that he had a 911 tape that validated other different aspects. Mr. English has been very deceptive towards me. Mr. English do not want me to talk, Your Honor, because Mr. English has fed me nothing but a whole bunch of mishaps since we have been in this. Did he say I'm irrational, Your Honor? Because, I'm not going to let him tell me anything, Your Honor. I know what I've done and I know what I didn't do, Your Honor. Mr. English has told me there is no way he can win this case. Mr. English has told me even –

MR. ENGLISH:

I'm going to — I'm going to again advise Mr. McCoy — Mr. McCoy, Your Honor, not to continue to divulge attorney/client conversations. And I'm going to reiterate to the Court, Your Honor, why I'm making a Motion to Continue. I apologize to the Court while I'm

making a Motion to Continue. Mr. McCoy, Your Honor, is not — is severely mentally compromised.

MR. McCOY:

No, sir.

MR. ENGLISH:

He is — he is — he is continuing, Your Honor, against all advice of counsel to not listen to me when his life is on the line. He continues to — If I followed Mr. McCoy's advice, I'd be put in a position, Your Honor, that I've never been put into my time as a lawyer of not following my client's advice. Your Honor, what we — this is a predictor. You're watching this man's behavior. It is bizarre.

MR. McCOY:

No, it's not, Your Honor.

MR. ENGLISH:

I need a mental expert appointed to evaluate Mr. McCoy, Your Honor, because, listen, this is going to be the trial because I'm not going to follow his advice. I am not going to follow his advice. He has a right as a client. He is going to come to trial and he is going to basically walk into the District Attorney's hands, get a conviction and get the death penalty. And when he gets the death penalty, Your Honor — because Mr. McCoy's not going to listen to me. Mr. McCoy is going to attempt to take over this trial and argue in front of the jury. And when he does that, Your Honor, I have the responsibility of then standing in front of the jury and fighting for his life. This man is not irrational — This man is irrational. He is severely emotionally and mentally compromised. I understand that the Court wants to move forward. The DA wants to move for-

ward. I want to move forward. But I have a higher ethical duty here. This man is irrational, Judge. He will not and cannot assist me. He is going to fight me. He is going to take over this trial. He is going to take over the trial, Judge. I am — during — On the questioning, he is going to take over this trial. This man needs to be evaluated, Judge, and that evidence needs to be brought before a jury at the proper time. Mr. McCoy has told me some bizarre stuff about the DA, myself and this Court. Mr. McCoy wants me to argue theory, Your Honor, that would almost certainly hand him to the DA. Mr. McCoy is angry at me –

MR. McCOY:

No, I'm not.

MR. ENGLISH:

— because I refuse — I refuse, Your Honor, as someone who has been practicing law for close to twenty years now, to walk this man into a death penalty when he's incapable of making rational decisions. Judge, I just saw — you just told this man to be quiet. I'm sitting there telling this man to be quiet. This man is divulging attorney/client conversations. And if I don't intervene now he's going to tell the whole case. He's going to tell everything we every talked about.

MR. McCOY:

That's not so, Your Honor. I have a freedom of speech. It's the United States Constitution versus –

MR. ENGLISH:

And I'm going to be quiet and let him go, Judge.

MR. McCOY:

No, Your Honor. Mr. English is validating and bringing up a whole charade in front of the courtroom, Your Honor. It is not — In that typical aspect, Your Honor, I also have a witness, Your Honor, in Houston that I asked Mr. English to address and subpoena through court that validates that I –

MR. ENGLISH:

I'm going to again tell you, Mr. McCoy —

MR. McCOY:

— that I was with her –

MR. ENGLISH:

I'm going to tell you, Mr. McCoy, you are bringing evidence into this courtroom that the District Attorney is going to use against you. You are divulging information that only you and I ought to be discussing.

THE COURT:

Mr. McCoy —

MR. ENGLISH:

Now, go ahead, Mr. McCoy.

THE COURT:

Mr. McCoy, I'm going to strongly caution you again that you are divulging information that's attorney/client privilege that should only be discussed by you and Mr. English and your attorney has advised you not to do this. This is all being recorded, sir.

MR. McCOY:

I understand, Your Honor.

THE COURT:

And, Mr. McCoy —

MR. McCOY:

My attorney is advising me not to discuss it, Your Honor, but when I discuss it with him he brushes it off and says it's irrelevant, Your Honor. How is the aspects of my guilt irrelevant, Your Honor? And that poses a bigger quandry right here, Your Honor, because Mr. Craig Forsyth, if you remember, Your Honor, was the same gentleman that cussed me out in front of Mr. David Shanks at the courtroom. You remember when I fired Ms. Pam Smart — When we got rid of Ms. Pam Smart on February the 11th of 2010, Mr. Craig Forsyth was the gentleman that cussed me out at the Bossier Sheriff's Office. And he's –

THE COURT:

Mr. McCoy, that was –

MR. McCOY:

— the litigation specialist.

THE COURT:

— not in my courtroom, so I —

MR. McCOY:

No. He didn't cuss me out in your courtroom, sir. He cussed me out in —

THE COURT:

Mr. — Mr. McCoy, there's no way that I could have seen that if it didn't happen in my courtroom.

MR. McCOY:

But I turned it in to the disciplinary board, Your Honor. And see these are factual things, Your Honor, that they're divulging your knowledge in the courtroom's knowledge about it. They're trying to intrigue

me in a circle, Your Honor, of things — pretending that things haven't happened, Your Honor, but they have happened, Your Honor. And, Your Honor, that is

THE COURT:

Well, Mr. McCoy — Mr. McCoy, Mr. English is your attorney. He is trying to advise you regarding this case and I know that you may disagree, but you don't need to put that on the record.

MR. McCOY:

But, Your Honor, if I don't put it on the judicial record and Mr. English still don't agree with the things that I'm asking him to do as far as subpoenaing people, Your Honor, if we go to trial without these proper people subpoenaed, Your Honor, that's a worse situation for me, Your Honor. Just like, Your Honor, the eyewitness that gave the description of the person at the scene of the crime, Your Honor, that hasn't been turned over to me for discovery so I could subpoena that person so that person can validate, Your Honor, that that wasn't me at the crime, Your Honor. The District Attorney haven't turned it over to us, Your Honor, and that's exculpatory evidence to prove my innocence. Yet every time a detective, Your Honor, interview a person that person gives them a description of that person and that person gives them the name and address of the person that validated it on judicial record and police report that the description of the person fleeing the scene, Your Honor —

THE COURT:

Is it in the police report, Mr. English?

MR. ENGLISH:

Your Honor — Your Honor — Your Honor –

MR. McCOY:

Mr. English –

MR. ENGLISH:

Your Honor —

THE COURT:

Excuse me, Mr. McCoy, I just –

MR. ENGLISH:

Your Honor — Your Honor, the District Attorney, to my knowledge, turned over all discovery to date.

MR. McCOY:

No, he didn't.

MR. ENGLISH:

May I finish? Your Honor, Mr. McCoy is asking me to subpoena witnesses to put forth a theory –

MR. McCOY:

No theory, thanks.

MR. ENGLISH:

To put — to put — to put forth a theory, Your Honor, that will help the District Attorney send him to the death chamber. I will not follow his advice. I will not subpoena FBI agents. I will not subpoena judges. I will not — I will not run all over the country looking for witnesses that don't exist. Mr. McCoy is severely mentally compromised, Your Honor, and - - and — and I'm asking this Court to grant my Motion to Continue so that he can be evaluated because this is going to be the case. It is going to be a zoo.

MR. McCOY:

No, it's not, Your Honor.

MR. ENGLISH:

It's going to be a zoo, Judge, because I'm not going to do what he wants me to do. I can be relieved from this case. I do not believe this man is rational. I think I have an ethical duty — I have discussed this with — I have sought legal counsel. I have sought legal counsel from other death penalty lawyers on advice on this. I have an ethical duty to this man not to follow his bizarre behavior. And, Your Honor, he will continue to sit here right now and go on and on and on, Your Honor. And I'm asking this Court to please allow me to have this man evaluated, Your Honor, because he is mentally and emotionally compromised.

MR. McCOY:

And, Your Honor, for the record, and I'm going to end my conversation, Your Honor. Your Honor, I've been evaluated. There is any — there is nothing wrong with me, Your Honor. You — Mr. English wants the Court to believe something is wrong with me to further evaluation that has already been evaluated before, Your Honor. There is nothing wrong with me. I'm fully competent. I'm fully understanding of the aspects of this case and —

MR. ENGLISH:

I'm going to advise Mr. McCoy to be quiet, Your Honor.

MR. McCOY:

And, Your Honor —

MR. ENGLISH:

I'm advising Mr. McCoy -MR. McCOY:

Let — let me talk here.

MR. ENGLISH:

— to be quiet, Your Honor. He's now saying stuff, Your Honor, that goes to the heart of his defense and he's compromising his case.

THE COURT:

Mr. McCoy, Mr. English has advised you to stop at this point. He has advised you to stop at a point long ago.

MR. McCOY:

Judge Cox —

THE COURT:

Yes, sir.

MR. McCOY:

— the FBI agent that I asked him to subpoena is imperative to my case. Ms. Shonda Stone is imperative to my case. Ms. Black is imperative to my case. He won't subpoena people that will validate my innocence. He won't subpoena people, Your Honor, that will validate the aspects of the collusion in which I'm involved in. Your Honor, this case is bigger than me, Your Honor, and they don't want the full exposure of what's going on here, Your Honor. I'm only asking my attorney as the client, Your Honor, to subpoena who I ask him to subpoena, Your Honor, so they can get up here and validate the truth, Your Honor. I'm not asking him to validate any theory. I'm not asking him to come across any type of irrational responses, Your Honor. I'm only asking Mr. English to meet me halfway here. I'm only asking Mr. English to give me his best here. But how can he give me his best, Your Honor, when he's giving

me excuses; when he's giving me impartial theories or things; just outright telling me what he's not going to do, Your Honor?

THE COURT:

All right, Mr. McCoy, I've taken the statement. I've let you make a statement –

MR. McCOY:

Yes, sir.

THE COURT:

— even though you've been advised about five hundred times not to make a statement. Mr. English has made a Motion for Continuance. Mr. Marvin, I will listen — I understand that you oppose and I — Anything else that you wish to address to the Court, sir?

MR. MARVIN:

No, sir, Your Honor, that's it. That's all we have.

THE COURT:

Mr. English and Mr. McCoy, this case has been set for trial since March of last year and a scheduling order was placed into effect as of March of last year. The Court has not heard from any doctors that stated that they cannot have their reports ready. And they will be able to meet with Mr. McCoy over the next two weeks.

MR. ENGLISH:

Your Honor, if I file a written motion today with statements from both of my experts indicating that they cannot be ready, will the Court reconsider its ruling here today? Because I'm doing this on their advice, Your Honor. Not mine.

THE COURT:

Mr. English, the experts should have known that when they took this case that they had a short time frame to do it, so I will deny the continuance.

MR. ENGLISH:

That's fine. That's fine, Your Honor.

THE COURT:

And I believe that you had stated on the record that you're ready to proceed forward. Mr. Marvin has stated that he's ready to proceed forward. And I believe Mr. McCoy is — in the past has stated that he was ready to proceed forward with this trial.

MR. ENGLISH:

I'll state for the record again, Your Honor, Mr. McCoy is mentally and emotionally compromised and unable to make rational decisions about it in my opinion.

THE COURT:

Well, this has been scheduled since March of last year –

MR. ENGLISH:

That's fine, Your Honor.

THE COURT:

— and had a scheduling order —

MR. ENGLISH:

That's fine, Your Honor.

THE COURT:

— so I therefore deny the continuance.

MR. ENGLISH:

That's fine. Thank the Court for the consideration.

THE COURT:

I do.

MR. MARVIN:

Thank you, Your Honor.

THE COURT:

Any other on that? Any other motions, Mr. Marvin?

No, sir, Your Honor.

THE COURT:

Any other motions, Mr. English?

MR. ENGLISH:

No, Your Honor.

(END OF HEARING ON MOTION FOR CONTINUANCE)

EXCERPT OF FEBRUARY 3, 2011 TRANSCRIPT RE MOTION TO APPOINT ADDITIONAL COUNSEL

* * *

THURSDAY, FEBRUARY 3, 2011

MOTION TO APPOINT ADDITIONAL COUNSEL

THE COURT:

Mr. Marvin, you can call your case, sir.

MR. MARVIN:

Your Honor, we'd call docket number one-six-three-three-seven-two (163,372). Your Honor, the Court of Appeal has issued a – granted the writ filed by defendant's counsel in this matter. And we'd ask that a copy of that be placed in the record; I think a copy probably already is. One-six –

MS. NOONAN:

Five-seven-two.

MR. MARVIN:

One-six-three-five-seven-two (163,572) is the right docket number, I'm sorry.

THE COURT:

One-six-three –

MR. MARVIN:

Five-seven-two.

THE COURT:

– five-seven-two, is that correct? Do you mind if I put that on this copy? This correction?

MR MARVIN:

Yeah, correct – correct my copy, please.

THE COURT:

Do you have any objection to that, Mr. English?

MR. ENGLISH:

I'm sorry?

THE COURT:

He just – he just put the wrong number on his on – his document. It's one-six-three-five-seven-two (163,572) on his motion that he filed. Is there any objection to me placing that five –

MR. ENGLISH:

That's – that's not – we're talking about the Motion to Appoint Additional Counsel, Your Honor?

THE COURT:

Yes, sir.

MR. ENGLISH:

That's fine, no problem, Your Honor.

THE COURT:

All right, thank you. And Mr. English, you're present and Mr. McCoy?

MR. ENGLISH:

Yeah, Your Honor, I'm sorry.

THE COURT:

That's all right.

MR. ENGLISH:

I apologize, go ahead – go ahead, Your Honor.

THE COURT:

And, Mr. McCoy, state your name and address for the record, sir.

MR. ENGLISH:

Your Honor – I got it. Attorney, Larry English, 835 Prospect, Shreveport, Louisiana, 318-222-1900. Here representing Mr. McCoy, who's present in court, Your Honor.

THE COURT:

All right, thank you very much. All right, and the Second Circuit has issued a continuance, the writ was granted, the stay has been lifted and has been remanded with instructions at this time. Mr. Marvin has filed a Motion to Appoint Additional Counsel and the Second Circuit Court of Appeal has issued in its instructions that Mr. McCoy, and I will read this into the record. It says: (quoted as read) "In addition, because this Court is not in possession of the entire record of this case, we direct the trial to ensure that Mr. McCoy is, or has been, fully apprised on the record of the benefits of having two capital-defense qualified attorneys and that Mr. McCoy has knowingly and intelligently waived the same." Mr. McCoy, the district attorney's office has filed a motion that would order that additional counsel be appointed to represent you in this case. And these counsel – based on the fact that, and Mr. Marvin if I misrepresent anything please correct me, we discussed this the other day that you have been declared indigent for the purpose, without objection by the state, for purposes of being able to get mitigation experts. There is a Supreme Court rule that is out there that states that if you're declared indigent that you have the right to counsel, which you've already been advised of that

right to counsel, that you would be given – Mr. English would still be your counsel but that death qualified parties would – death qualified attorneys would be appointed to represent you in this matter. That would come through the public defender's office, which they would appoint death qualified personnel to be able to represent you in this case. Mr. Marvin has asked that those two people be qualified and that you be appointed through the public defender's office death qualified individuals. That usually comes through CAPOLA, which is the Capital Assistance Program if I'm stating that correctly, and CAPOLA would be appointed and determine who those counsels are. Am I misstating that?

MR. MARVIN:

I think that the Court should declare, I mean, should appoint the public defender's office with instructions that it should appoint two death qualified people and there may be one from this local PDO and one from CAPOLA or may be more that one.

THE COURT:

Okay.

MR MARVIN:

Just leave that up to them.

THE COURT:

All I need to do is appoint the public defender's office but they will make sure that the parties that need to be appointed are appointed. Mr. English, do you have any statements towards that?

MR. ENGLISH:

Your Honor, I – I don't object, okay? And, I've advised Mr. McCoy – Mr. McCoy here – here is – Mr. McCoy has an objection, Your Honor, but I think if we explain it to Mr. McCoy and he understands certain things, I think we would be all right. Even though the Court – there's just certain rules that has to be followed. In order for the Court to appoint two attorneys the public defender's office has to be appointed.

MR. MCCOY:

No they don't.

MR. ENGLISH:

Let – let me – let me finish. Mr. McCoy has an objection that if – if the counsels come from the public defender's office here locally. I have explained to him that – that the – that the – more likely than not and – and that those two attorneys would be appointed from the Louisiana Capital Defense Association. Which means they do – they do not work for the public defender's office. They are death penalty qualified. More likely than not they will be two attorneys in private practice who – who are – who work with this association. And that the public defender's office will merely be retaining those people. But nobody from the local public defender's office will be involved. in this case and I think – would the local public defender's office agree with that?

THE COURT:

Mr. Fish, do you want to address that since you're with the public defender's office?

MR FISH:

Randall Fish, on behalf of the public defender's office. Your Honor, at this time we don't know. As far as

I know a capital case through the public defender's office would be assigned to me and Larrion Hillman. I do know, at this point, I certainly don't know that the Capital Assistance Project would be secured through the public defender's office –

THE COURT:

Okay.

MR. FISH:

– at the present time. And in addition, we may or may not seek – seek review of being appointed in addition to Mr. English. That's something I have to discuss with Ms. Smart and make a decision on in the next day or two. But I do see some practical problems with appointed counsel being appointed in addition to private counsel. I think it – if – if we're to be appointed, I think it should be our responsibility to solely handle the defense of the case and not share that responsibility with Mr. English.

THE COURT:

Okay. Mr. English, any response to that?

MR. ENGLISH:

Your Honor, the Second Circuit made a certain suggestion, the D.A. has filed a motion, I'm not –I – I – I don't object to additional counsel being appointed to support me. I mean, I'm – my ego is not such as that – that's either – I'm – I'm comfortable; I'm confident that under the facts of this case that I can do what needs to be done. But certainly having two additional attorneys in no way offends me. Mr. McCoy, Your Honor, does believe that – that – that the public defender's office will adequately represent him. And he's asking Your Honor that, and I think that, Your Honor, that if – if he

doesn't, you know, whether, you know, I'm not here to argue and – and nor to say – even suggest that I agree with him that he can because I know the lawyers, and I respect them well, and I think they can. But after all, Your Honor, he has – he should have some say so in – in – in who is his counsel. He would not have an problems, Your Honor, if the lawyers come from the Louisiana Capital Defense Association. In light of everything that Mr. Fish has said, I – I have no response and – and – to that. I'm simply trying to communicate where I believe my client's position is.

THE COURT:

And Mr. –

MR. ENGLISH:

So now if the – and – and having said that, Your Honor, I personally do not have any problem and recommend to Mr. McCoy that you cannot have to many lawyers in a case like this. I don't, you know, I'm perfectly comfortable proceeding as a single attorney because I'm relying upon the expertise – there are other, you know, capital defense lawyers who have been providing me expertise and direction in this case. I understand it is a capital case; I feel confident – confident that I can represent Mr. McCoy. But I welcome any help if the Court so deems so and the district attorney's office deems so. The problem is with Mr. McCoy, Your Honor, and – and he doesn't have any confidences in the public defender's office.

THE COURT:

All right. Mr. McCoy?

MR. ENGLISH:

Have I said that correctly, Mr. McCoy?

MR. MCCOY:

You're exactly right, sir.

THE COURT:

All right. Mr. McCoy, and I'm directing this at you, because I'm trying to follow the Second Circuits directive, sir. And I want to make sure that this is clear for the record. The district attorney has asked that additional capital qualified personnel be appointed to represent you, sir. And I am entertaining that motion at the present time. The only way that I can appoint anybody is that it has to be appointed through the public defender's office. And the public defender's office would of course decide who would be capital qualified to be able to represent you, and assist Mr. English, that is my option. From listening to Mr. English you're stating that you want Mr. English and Mr. English alone to represent you and you do not want the public defender's office to represent you. Is that what this Court is hearing?

MR. MCCOY:

Well what I'm saying today, Your Honor, I would love, you know, to have my prior representation of Mr. English but the assistance of the public defender board, no, sir, it's not needed by myself. I have no confidence in the public defender board. I've had prior run-ins with the public defender board. And if I'm not mistaken, Judge, I mean, please correct me if I'm wrong, there are some outside officials that can be retained through the – the Louisiana Association for other conflict of interest attorneys, Your Honor. I mean, this is my life, Your Honor.

THE COURT:

Mr. McCoy?

MR. MCCOY:

I understand the statements –

THE COURT:

Mr. McCoy?

MR. MCCOY:

– that are validated before the Court, Your Honor, but I have no second chance at this, Your Honor. And I don't want the Court to put counsel on me, Your Honor, that I don't want. object of this, Your Honor.

THE COURT:

Mr. McCoy, I'm not trying to put counsel on you that you don't want. But the only way that I can do this is to put the public defender's office in there.

MR. ENGLISH:

Your Honor?

THE COURT:

Mr. English, I'll let you speak to Mr. McCoy.

MR. ENGLISH:

Yeah, let me – one second, Mr. McCoy.

(MR. ENGLISH CONFERING WITH MR. MCCOY OFF THE RECORD)

MR. ENGLISH:

Go ahead, Mr. McCoy. Go ahead, Your Honor.

THE COURT:

Mr. McCoy, are you telling this Court that you fully waive the public defender's office being appointed? Understanding that Mr. English is not capital qualified. And that you waive these two attorneys, I mean, you

waive the Court appointing the public defender's office with capital qualified attorneys to be sitting on this case? Is that what you're telling this Court?

MR. MCCOY:

Your Honor, I'm telling this Court today that I am confident with Mr. English but with other legal assistance beyond the public defender's office, Your Honor. Beyond the public defender's office, Your Honor. Because if they was to appoint me – Your Honor, this is to better represent the Court as well. If they were to appoint me some counsel from the public defender's office, I'm going to fire them, Your Honor. I'm just putting it qualified on record; I'm going to fire them.

THE COURT:

So you are waiving any representation by the public defender's office fully and voluntarily, is that what I hear you say?

MR. MCCOY:

Yes, I don't want anybody from the public defender's office, Your Honor. But beyond the public defender's office, Your Honor, conflict of interest attorney, I will accept –

THE COURT:

I don't–

MR. MCCOY:

– from the Louisiana Defense Association of the Capital Association, I will accept, Your Honor.

THE COURT:

Mr. McCoy, I don't have that authority. The only authority I can do is appoint the public defender's of-

fice. I will ask you again, are you fully, and knowingly, and voluntarily waiving the public defender's office to be appointed as co-counsel with Mr. English?

MR. MCCOY:

Yes, I am, Your Honor.

THE COURT:

All right. Mr. Marvin, any statements?

MR. MARVIN:

Let me question Mr. McCoy, if I can?

THE COURT:

Mr. –

MR. MARVIN:

Mr. McCoy?

THE COURT:

– English? Just – Mr. Marvin. Mr. English, do you allow Mr. Marvin to question Mr. McCoy specifically –

MR. ENGLISH:

I'm – I'm – I'm uncomfortable, Your Honor, as to – as to – what are we going to ask him?

MR. MARVIN:

Mr. McCoy, you – you don't even know who the public defender's office is going to assign to your case, yes or no?

MR. MCCOY:

It don't matter, Mr. Marvin.

MR. MARVIN:

So you –

MR. MCCOY:

I've – I've had dealings with the public defender's office; I've had dealings with Mr. Fish, Mr. Marvin. I've had personal experience with –

MR. MARVIN:

I– yeah, but you don't know that it's going to be Mr. Fish, yes or no?

MR. MCCOY:

No, I don't but in the same aspect –

MR. ENGLISH:

Okay, all right –

MR. MARVIN:

Okay. But what if it's a public defender attorney that you've never met. That you have full confidence in the way you have confidence in Mr. English?

MR. MCCOY:

No, sir.

MR. MARVIN:

You – you would not accept that representation?

MR. MCCOY:

No, sir.

MR. MARVIN:

Okay. And you understand the reason the Court is trying to appoint two lawyers is if you end up being found guilty and this case proceeds into the penalty phase to determine whether you end up with a death penalty or life in prison. The reason the Supreme Court rule says that you should appoint two attorneys

is because that attorney that handled the guilt phase of the trial has failed.

MR. MCCOY:

Uh-huh (affirmative).

MR. MARVIN:

And the jury might possibly have lost confidence in anything that he or she says and not believe them. So in the penalty phase when that same lawyer stands up there and says, ladies and gentlemen, you only have two options here give my client death or give him a life sentence. There is no not guilty at that point.

MR. MCCOY:

Uh-huh (affirmative).

MR. MARVIN:

And if the jury says well this is the same lawyer that got up there and told us he didn't do this before and I didn't believe that, so why should I believe him now?

MR. ENGLISH:

Let – let me –

MR. MARVIN:

That's the reason. Do you understand that?

MR. ENGLISH:

I– I– I respect what the state's statements are, but the truth of it is, the state does not – doesn't – at this point does not know what– I'll just– this caveat what counsel's defense will be. Okay? I just wanted to make that statement. But overall, I believe the district attorney is giving you good advice.

MR. MCCOY:

And I believe he is too. But it's basically you're– it's just like asking a person to plead in the blind. It's– basically it's asking a person to accept something until that time resonates itself and that I can't do.

MR. MARVIN:

Okay. Let me ask you this – another question, Mr. McCoy. Do you understand that if the Court appoints the public defender's office and you end up with two lawyers that you don't like, whether they're Mr. Fish or anybody else that you don't like, you always have the right to terminate those lawyers?

MR. MCCOYS:

Yes, sir. I just spoke that on record; I'm fully aware of that. But the repercussions of that is this is time consuming, Mr. Marvin, and most of all Mr. Marvin, that is against my best judgment. You know, to even obtain someone that I have no confidence in whatsoever. I have no –

MR. MARVIN:

But you've never met these people.

MR. MCCOY:

But the public –

MR. ENGLISH:

Let it - - all right – okay –

MR. MCCOY:

I've – I've dealt with Ms. Smart, Mr. Marvin.

MR. MARVIN:

Okay.

MR. MCCOY:

And she's the head –

MR. MARVIN:

You don't know that it's going to be Ms. Smart.

MR. ENGLISH:

All right.

MR. MCCOY:

– over the public defender's board.

MR. ENGLISH:

All right.

MR. MCCOY:

That's the– that's the –

THE COURT:

Okay, I'm going to –

MR. MCCOY:

– same circle, Your Honor.

MR. ENGLISH:

All right – all right – all right.

THE COURT:

You can't argue over each other –

MR. ENGLISH:

All right.

THE COURT:

– because we've got to get this on the record, number one.

MR. ENGLISH:

All right, I – do you have any other – any questions?

MR. MARVIN:

I want to make sure that he knowingly, and intelligently waives his right –

MR. ENGLISH:

I – I – I –

MR. MARVIN:

– to the two attorneys.

MR. ENGLISH:

I don't think there's any doubt that my counsel under – that Mr. – that my client understands and he has stated repeatedly that he does not want the public defender's office defending him.

MR. MCCOY:

That's exactly right.

MR. ENGLISH:

My – now – now this, you know, I will attempt in any way I can to go out and – and see if I can look for other means of getting him two counsels, but he doesn't want the public defender's office. I think he's– I think he's –

MR. MARVIN:

Okay.

MR. ENGLISH:

–he's clear about that. I – I disagree with him on that.

MR. MARVIN:

Well – well you keep saying that –

MR. ENGLISH:

Okay.

MR. MARVIN:

– and if the issue is not whether –

THE COURT:

All right.

MR. MARVIN:

– the words that come out of your mouth, the issue of what comes out of his mouth.

MR. ENGLISH:

Go ahead, Mr. McCoy.

THE COURT:

I agree, Mr. Marvin. Mr. Marvin, I agree. Let me – let me try to handle this.

MR. ENGLISH:

Okay. Okay.

THE COURT:

Mr. McCoy, Mr. Marvin has covered, like I tried to cover with you, what the Supreme Court is stating. The Supreme Court has stated that Mr. English, and I don't know what Mr. English strategy is as far as defense or anything else. I don't know what Mr. Marvin's strategy is as to how he's presenting the case. But for some reason you go into the guilt phase and they find you guilty, and then it goes to a penalty phase. If Mr. English is the only attorney the Supreme Court has

stated that he may lose creditability and that may affect you in the penalty phase as Mr. Marvin has stated before. That is the reason behind the Supreme Court statute. Mr. McCoy, before you speak again. I can only appoint the public defender's office once you have been – once you have been declared indigent. That is my only recourse is to declare that the public defender's office represent you once you have been declared indigent. Now from what I've heard from your attorney, and what I've heard from you, but I need to know exactly; no talking about the bush.

MR. MCCOY:

None whatsoever, Your Honor.

THE COURT:

All right. My only recourse is to appoint the public defender's office. Do you want me to appoint the public defender's office as second counsel?

MR. MCCOY:

For the record, again, Your Honor, I'm totally opposed to that and most of all, Your Honor. I mean, if you really look at it, Your Honor, I choose not to be strong armed to take a public defender's aspect of secondary counsel when that's totally against my wishes, Your Honor. I know the Court by verbatim can work some other appointment of capital specialist out – other than the public defender board, Your Honor. Because the public defender board may can finance someone through the public defender's office to represent me in another –

THE COURT:

The only option –

MR. MCCOY:

– jurisdiction.

THE COURT:

Mr. McCoy, and I'm not trying to talk over you and I'm not trying to be rude. The only option this Court has is once you're declared indigent is to appoint the public defender's office. You understand all of your rights, is that correct, Mr. McCoy?

MR. MCCOY:

That's exactly correct, Your Honor.

THE COURT:

You understand that you have the right to have another attorney appointed to represent you through the public defender's office, is that correct?

MR. MCCOY:

Yes, sir, but I don't want that, Your Honor.

THE COURT:

And you are fully and voluntarily waiving those rights, is that correct?

MR. MCCOY:

I'm waiving the right of someone from the public defender's office representing me, Your Honor, because –

THE COURT:

And you're doing that knowingly and voluntarily, is that correct?

MR. MCCOY:

Yes, sir.

THE COURT:

All right, thank you, sir. Then I will not appoint the public defender's office at this time, Mr. Marvin.

MR. MARVIN:

That's fine, Your Honor. We're– we're comfortable with that and we would ask that the matter in accordance with the writ from the Second Circuit that we reset the matter.

THE COURT:

All right.

MR. ENGLISH:

Your – Your Honor, may I make a statement before we go? I think it's important I need to make a statement on the record here.

THE COURT:

Yes, sir.

MR. ENGLISH:

Because, Your Honor, there's– there's a lot about me not having capital experience – capital certified which I'm not. But I just want to put on the record and remind the reason why I'm sitting here, Your Honor, not making any money representing Mr. McCoy because Mr. McCoy's family came to me and Mr. McCoy was representing himself. And I understand what the processes are in cases like this but I ultimately believe, Your Honor, it's better to have me sitting here representing Mr. McCoy than Mr. McCoy sitting here by himself and representing his own self in such an egregious case. So under – it is what it is. I respect the district attorney's motion; I respect the Court's motion, Your Honor. And I will endeavor to do what we try to have to do to – to maybe see if I can't – we can't figure

this issue – fix this issue another way. But I think I need to put that on the record, Your Honor, that I got involved in this case because my client – I'm not being paid and my client was representing himself in a capital murder case.

THE COURT:

Okay. All right, I've allowed that statement to be made.

MR. ENGLISH:

Thank you.

THE COURT:

At this time Mr. McCoy, I believe, has knowingly, voluntarily, and intelligently waived that second counsel to be appointed, therefore, I deny your motion at this time, Mr. Marvin, as Mr. McCoy can choose who his counsel is as long as he knowingly and intelligently does so. And I believe we've had a long colloquy in this situation. So I, therefore, deny that motion. Gentlemen, I am going to enter a copy of the State of Louisiana Court of Appeal's Second Circuit opinion into the record, is there any objection to that, Mr. Marvin?

MR. MARVIN:

No, sir.

THE COURT:

Mr. English?

MR. ENGLISH:

No objection, Your Honor.

THE COURT:

I'll enter that into the record at this time.

MR. MCCOY:

Also, Your Honor, I want to state on the record

MR. ENGLISH:

Wait.

MR. MCCOY:

– that –

MR. ENGLISH:

Wait let him finish.

MR. MCCOY:

Mr. – Mr . English have been paid by my mom and they –

MR. ENGLISH:

Okay.

MR. MCCOY:

We're not totally or indigent aspect on this but they may have not paid him as much as he choose to pay. But he has not just taken this case without any financial contributions, Your Honor.

THE COURT:

All right, Mr. McCoy.

MR. ENGLISH:

Thank you, Your Honor.

THE COURT:

I appreciate that, that's between you and Mr. English.

MR. ENGLISH:

Thank you, Your Honor.

THE COURT:

All right. Mr. English; Mr. Marvin, I want to set this trial date. I'm trying to follow the Second Circuit's opinion; I want to set this for July 28th for jury trial.

MR. ENGLISH:

Hold on just a second, Your Honor.

MR. MARVIN:

That's a Thursday?

THE COURT:

That starts on a Thursday.

MR. MARVIN:

Do the same thing?

THE COURT:

Yes, sir, just like we did before.

MR. MARVIN:

Okay.

MR. ENGLISH:

Your Honor, can I just look at my calendar just to – although, I understand this case takes precedence, I just want to make sure.

THE COURT:

This case will take precedence.

MR. ENGLISH:

I understand, Your Honor.

THE COURT:

And, Mr. – and I am trying to comply because Mr. McCoy has filed a motion for a speedy trial, I'm trying

to do this within the frameworks allowed by the Second Circuit in order to give time for you to be able to get your mitigation experts, Mr. English. But I'm trying to do this expeditiously as possible.

MR. MCCOY:

Also, Your Honor, I would like to speak that –

MR. ENGLISH:

Robert – Robert –

MR. MCCOY:

– I've always –

MR. ENGLISH:

Robert –

MR. MCCOY:

– retained some aspect with Mr. English, Your Honor, that – I've also asked Mr. English to specifically subpoena some people and I just discussed that with him –

THE COURT:

Mr. McCoy –

MR. MCCOY:

– and he haven't did that. Mr. English –

THE COURT:

Mr. –

MR. MCCOY:

I want to just state this on record, Your Honor.

THE COURT:

Mr. McCoy, that is between –

MR. ENGLISH:

Okay.

THE COURT:

Mr. McCoy, that is between you and Mr. English.

MR. MCCOY:

He's–

THE COURT:

I will set a scheduling order for any motions that need to be filed. But that is between you and Mr. English as Mr. English – that is up to his trial strategy as he is your attorney. But you will be able to discuss that with him. Now, Mr. McCoy, I've let you I've let you speak today because I've had to ask you some questions. But at this time, sir, I'm going to ask that you remain silent because this is being recorded and I don't want you to tell any of your case strategy. You have the right to remain silent; I want you to remain silent at this time.

MR. ENGLISH:

Thank you.

THE COURT:

All right?

MR. ENGLISH:

Thank you, Your Honor.

THE COURT:

Thank you.

MR. ENGLISH:

Thank you, Your Honor. So July the 28th is the is that when we – is that when we will start, Your Honor?

THE COURT:

Yes, sir,

MR. ENGLISH:

Picking the jury –

THE COURT:

– that is when we start.

MR. ENGLISH:

– or the trial date?

THE COURT:

Sir?

MR. ENGLISH:

Is that when we start picking a jury?

THE COURT:

Yes, sir.

MR. ENGLISH:

Okay.

THE COURT:

Mr. –

MR. MARVIN:

Okay. Now there's a civil– two civil juries that week, this jury pool won't have anything to do with those?

THE COURT:

No, sir, they will not.

MR. MARVIN:

Okay. And we would ask the same orders; I don't remember if I made that order about additional jurors –

THE COURT:

Yes, sir.

MR. MARVIN:

– for this term. We would ask for that to be carried over to that time.

THE COURT:

Yes, sir.

MR. MARVIN:

Whoever made it, the additional number, I don't remember.

THE COURT:

Yes, sir, we will. So those civil juries will have nothing to do with this jury term and I will subpoena the jurors –

MR. MARVIN:

All right.

THE COURT:

– at that point in time. We will call those jurors in and we will proceed in the same order. I will issue a scheduling order just like I've done; I'll have that to you within the next week and set motion dates and time frames. So.

MR. MARVIN:

Additionally, Your Honor, I'm not – I don't have them in front of me the letters that Mr. English attached to his second writ to the Court of Appeal to –

MR. ENGLISH:

I'll provide them to you.

MR. MARVIN:

– continue. Well, I have them; I just don't have them in front of me. But I don't know exactly what those two experts how they ended their letters with regards to how much time they needed.

THE COURT:

They said approximately six months, I believe. So that would put us at approximately the right time.

MR. MARVIN:

Okay. We would – we would ask that the Court serve the scheduling orders on those two experts who Mr. English provided the letters from.

THE COURT:

Then I will –

MR. MARVIN:

Have them served by the sheriff and a return put in the record.

THE COURT:

We will absolutely do that, Mr. Marvin.

MR. MARVIN:

Thank you.

THE COURT:

All right, Mr. English?

MR. ENGLISH:

Your Honor, let me just ask this question. Is it possible that the Court would – could pick a later date to start than July?

THE COURT:

No, sir.

MR. ENGLISH:

All right.

THE COURT:

Absolutely not. I'm trying to make the Court's – I'm trying to follow the Court of Appeal's order. They said as expeditiously as possible.

MR. ENGLISH:

That's fine, Your Honor.

THE COURT:

I'm trying to make it within the six months, Mr. –

MR. ENGLISH:

Your – Your Honor, we – we – we have the – the experts have been retained and approved.

THE COURT:

Yes, sir.

MR. ENGLISH:

Okay. So my only concern of it is that they have enough time to do what they need to do, Your Honor.

THE COURT:

All right.

MR. ENGLISH:

That's all. Okay—

THE COURT:

So –

MR. ENGLISH:

– that's fine.

THE COURT:

All right. Any other matters that need to be taken up on this case?

MR. MARVIN:

Not that we're aware of, thank you, Your Honor.

THE COURT:

All right, thank you. I'll set the scheduling order and send a copy to each party.

MR. MARVIN:

Thank you.

THE COURT:

And I'll file this motion denying that appointment.

MR. ENGLISH:

All right. It's good to see you. Okay.

THE COURT:

All right.

(END OF HEARING ON MOTION)

No. 16-8255

IN THE

Supreme Court of the United States

ROBERT MCCOY,
Petitioner,

v.

LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

JOINT APPENDIX
VOLUME II OF II (JA432-JA760)

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PETITION FOR CERTIORARI FILED MARCH 6, 2017
CERTIORARI GRANTED SEPTEMBER 28, 2017

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IN THE TWENTY-SIXTH JUDICIAL DISTRICT COURT

IN AND FOR THE PARISH OF BOSSIER

STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS **NUMBER: 163,573**

ROBERT LEROY MCCOY, II

EVIDENCE ADDUCED AT HEARING in the above entitled and numbered cause, before Your Honor, Jeff Cox, Judge, of the Twenty- Sixth Judicial District Court in and for the Parish of Bossier, State of Louisiana, on the 12th day of July, 2011, at Benton, Bossier Parish, Louisiana.

APPEARANCES:

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TUESDAY, JULY 12, 2011

MOTION FOR DISCOVERY AND MOTION TO QUASH SUBPOENAS

THE COURT:

Mr. Marvin, are you ready?

MR. MARVIN:

Yes, sir, we're ready.

THE COURT:

All right, Mr. English, are you ready?

MR. ENGLISH:

I'm ready -- we're ready, Your Honor.

THE COURT:

All right.

COURT REPORTER:

Your Honor, I need the case too, please.

THE COURT:

And, Mr. McCoy, if you'll rise and state your name for the record, please.

MR. MCCOY:

My name is Robert McCoy, I stay at --

THE COURT:

And your address, please?

MR. MCCOY:

-- 7323 Altus Loop, Shreveport, Louisiana, sir.

THE COURT:

All right, thank you, sir.

MR. MARVIN:

Your Honor, this is docket number one-six-three-five-seven-two (163,752). There are two motions that I believe are set for today. One is a motion to quash some proper person subpoenas filed by Mr. McCoy and the other is a motion -- the state's motion for discovery that required a response by the defense -- I would -- I would ask that we take the discovery motion up first. I understand Mr. English is just going to respond to that on the record and I think that's all that's required.

MR. ENGLISH:

Your Honor, I received a motion from the state on producing any alibi. We have no alibi evidence in this case, Your Honor, to respond to the state with.

THE COURT:

All right.

MR. MARVIN:

And that's sufficient for our motion, Your Honor. And the next motion is the motion to quash proper person subpoenas. Your Honor, Mr. McCoy requested -- I don't remember exactly the number, several subpoenas that in our opinion would be simply meant to either delay or harass the people sought to be subpoenaed. There was a judge, an FBI agent, I think there was a justice of the peace, we have no intention of calling any of those people for any reason for the state. And we would just submit -- and also the clerk of court here had responded to Mr. McCoy that -- that his requests were not in proper form, some of them didn't contain proper addresses, and things like that. And the Federal Bureau of Investigation responded to Mr. McCoy with a courtesy copy of the letter to me that he did not follow proper procedures before attempting to subpoena an FBI agent. But for all those reasons -- and in addition, Your Honor, we think that the -- I know that this is a death penalty case, but there is a limit on the number of trial subpoenas that -- that should -- normally issue in a case. And with his request for these proper person subpoenas would put him — would put his attorney's ability to subpoena witnesses at jeopardy. Because it would exceed the number allowed by the code of criminal procedure. So we would ask to quash those proper person subpoenas.

THE COURT:

Mr. English?

MR. ENGLISH:

Your Honor, I do not adopt any of the subpoenas that Mr. McCoy has filed. He has done that against my advice. As I have stated numerous times, Your Honor,

it is my opinion that Mr. McCoy lacks the mental capacity to even help me defend himself in this case. I believe that Mr. McCoy is insane even though the doctors have found him to be legally sane. I believe that Mr. McCoy is insane; he is incapable of helping me to defend him in this case. He continues to take actions, Your Honor, that I believe will under mind my ability to save his life. I would also put on the record that there was a potential opportunity for Mr. McCoy to plead in this case and the state would not impose the death penalty upon him. He has rejected that outright. I am at the point, Your Honor, of — it is that I have a client that believes that I'm in conspiracy with you, the district attorney, the FBI, the Bossier Parish Sheriff's Department, the Caddo Parish Sheriff's Department, and the United States Government, Your Honor, to convict him. I do not adopt these — I do not adopt these motions. I do not believe that my client is capable of helping me defend his life and I believe that all the actions that he is attempting to take here, Your Honor, will only under mind my ability to save his life. And further move him more quickly to the death penalty.

MR. MCCOY:

Well, Your Honor, I would like to speak as well.

Your Honor.

THE COURT:

Mr. McCoy, before you speak and Mr. —

MR. ENGLISH:

May I state one more thing, Your Honor?

THE COURT:

Yes, sir.

MR. ENGLISH:

I'm going to advise Mr. McCoy not to speak in this courtroom as I have — that his — he — he — he will divulge attorney/client privilege and any statements that he makes here will further hamper my ability to defend him and will only quicken his trip to the death chamber, Your Honor.

THE COURT: Mr. McCoy, before you speak —

MR. MCCOY:

Yes, sir.

THE COURT:

I'm going to advise you that you've retained an account — retained counsel number one, number two, you have stated on the record several different times that you wish to have Mr. English as your counsel. You have understood that he is not death penalty qualified. You have understood all of that but you have maintained that he is your counsel.

MR. MCCOY:

Yes, sir, I have.

THE COURT:

You have — Mr. McCoy, you have the right to remain silent. Anything that you say can and will be used against you in a court of law.

MR. MCCOY:

Yes, sir.

THE COURT:

You understand that these proceedings are being recorded.

MR. MCCOY:

Yes, sir, I do know.

THE COURT:

You do have counsel; the counsel has advised you to remain silent at this time. You do not have to make any statement and I want you to understand that these are being recorded and anything that is said will be used against you potentially by the prosecutor's office. Now if you wish to make a statement, sir, I cannot stop you from making that statement but I am strongly, strongly urging you not to make any statements on the record, sir.

MR. MCCOY:

Thank you, Your Honor.

THE COURT:

All right, sir.

MR. MCCOY:

Your Honor, I would like to present to the Court today that I have subpoenaed those witnesses in proper form through the Clerk of Court office with proper addresses, with proper addresses from the Clerk of Court office, and the D.A. feels as if these witnesses will not be productive for me due to the fact that they have probable interest in this case. In order to have a probable defense for myself, Your Honor, I have to have my vindicated witnesses that I need to validate my defense. That will be just like putting someone before an arsenal with anything — with anything to represent themselves. And also, I've talked with Mr. English about a lot of matters, Your Honor. They do not want me to present a defense, Your Honor, when I have a defense to be presented onto. Also, the FBI had wrote

me a letter as well. I subpoenaed FBI Agent, J.T. Coleman about some issues that has very much trust worthy clearance to deal with these proceedings around here. And Mr. Schuyler Marvin tried to under mind me; I have the letter here. By writing them they told me to write them an official affidavit to validate and quote the status of which I needed this FBI agent. And Mr. English just got up and quoted some stuff that was never said about me. See I just spoke with Mr. English a while ago. Mr. English is trying to really under mind a lot of stuff, Your Honor. I had to go find proper paperwork about a lot of this stuff myself, Your Honor. Mr. English has not been in proper communication with me. Yes, he's an attorney for me but Mr. English is not doing the proper protocol in which he should do to properly represent his attorney — I mean his client. There's a zeal that an attorney is supposed to have for his client and that zeal is not being met here. He can get up and tell you there's a conspirer against everything, no it's not. I'm going to maintain my innocence, Your Honor. I'm going to maintain the witnesses that properly subpoenaed. And I'm going to maintain that I am going to trial, Your Honor. There's nothing that Mr. English nor Mr. Schuyler Marvin can do to try and vindicate me. I've got a right to face my accusers, Judge Cox. And that is — that's what I'm going to do.

THE COURT:

All right, Mr. McCoy, nobody is trying to keep you from going to trial, sir. As far as the witnesses —

MR. MARVIN:

Your Honor, we would like to just — as far as it involves the one particular FBI agent just to offer into the record the letter that Mr. McCoy received from the Department of Justice that tells him how to go about

subpoenaing a federal agent. I'd like to just submit the original; I'll get a copy back for my file later.

THE COURT:

Any objections?

MR. ENGLISH:

No objections, Your Honor.

THE COURT:

All right, with no objection that offering will be received into evidence. Do you want me to mark this as State's One, Mr. Marvin –

MR. MARVIN:

That's fine, Your Honor.

THE COURT:

— for identification for this proceeding?

(STATE'S EXHIBIT ONE RECEIVED INTO EVIDENCE)

MR. MARVIN:

And as far as the other requests, I do understand, I think, what Mr. McCoy is attempting to do but the number of people that he has subpoenaed and the relevance that I can just only imagine that they could offer to this proceeding is zero. I don't — I cannot see — and — and — if he has corrected his request to the clerk's office he may very well have done that but I don't have any proof of that. And that's okay too but when it comes time for him to present a defense, I would just ask the Court to revisit this issue and make sure on the record that if there is someone that he thinks should be here in his defense, I know I cant force him to divulge

that at this time but I cannot see what in the world some of these people can offer to this case.

MR. MCCOY:

And you —

MR. MARVIN:

But they're going to have to be addressed at some point because he —

MR. ENGLISH:

May I respond, Your Honor?

THE COURT:

Yes, sir, Mr. English.

MR. ENGLISH:

Your Honor, let me restate for the record again, as long as I am the counsel of record in this case I have an ethical duty to Mr. McCoy that goes beyond whether or not to follow Mr. McCoy's advice. I have no ethical duty as a lawyer to hold Mr. McCoy's hand while he walks into the death chamber.

MR. MCCOY:

And you —

MR. ENGLISH:

I have an ethical duty, Your Honor, to try to defend him and do the most best I can to save his life. I will not call those witnesses if they are subpoenaed. Those witnesses if they're put on the stand would only under mind my ability to save Mr. McCoy's life. We're not talking about jail time here. We're talking about Mr. McCoy's life. I cannot — I cannot ascend to the Court and tell the Court whether or not to — to — to grant the state's motion or not, that's up to the Court. But I

will not call those witnesses. If those witnesses are called they will under mind my ability to save Mr. McCoy's life in this case. I do not believe that Mr. McCoy has the mental capacity to assist himself to — to insist on going down this path, Your Honor, is reckless. It is against my advice and it would only quicken his trip to the death chamber.

MR. MCCOY:

Well, Your Honor, what is reckless, Your Honor, is my attorney —

THE COURT:

Mr. McCoy —

MR. MCCOY:

— not subpoenaing anybody, Your Honor. That's reckless, Your Honor. And the state has no productivity of the process of my defense, Your Honor. So he's saying what's relevant is not irrelevant. It's most of all — yes, it's not irrelevant to him, Your Honor, because he's not subpoenaing them. He's not the one that's being prosecuted here.

THE COURT:

All right, Mr. McCoy, I'm going to stop you at this point. I understand your position; I'm not trying to do anything but protect your rights, sir.

MR. MCCOY:

Thank you, sir.

THE COURT:

And I'm -- I'm -- listened –

MR. MCCOY:

Thank you.

THE COURT:

I will revisit this issue but there is the issue of whether or not that you have properly subpoenaed these people. I do quash the FBI's subpoena because it has not been properly done as shown by the letter. If you do it properly according to the -- Mr. McCoy, I'm making my ruling, according to the letter that has been stated by the FBI Agent, J.T. Coleman, has not been done properly, it is quashed under federal statutes --

MR. MCCOY:

No, it's not, Your Honor.

THE COURT:

Mr. McCoy, I'm making my --

MR. MCCOY:

I have a copy of it --

THE COURT:

Mr. McCoy, I'm making my ruling, you will not interrupt me while I make my ruling.

MR. MCCOY:

Your Honor, that's --

THE COURT:

You can --

MR. MCCOY:

-- that's --

THE COURT:

-- you can disagree with me --

MR. MCCOY:

-- undermining my defense, Your Honor.

MR. ENGLISH:

Robert, I suggest you be quiet, the Judge is speaking.

MR. MCCOY:

I understand but that's —

MR. ENGLISH:

You have to allow the Judge to speak.

MR. MCCOY:

That's undermining my defense, Your Honor.

MR. ENGLISH:

Let the -- let the Judge make his ruling and you can object to it.

MR. MCCOY:

On —

MR. ENGLISH:

Let the Judge make his ruling.

THE COURT:

Under the federal statutes --

MR. MCCOY:

The federal agents have to rule on that, Your Honor. And, you know, they've given me adequate amount of time to present that motion, Your Honor.

THE COURT:

Mr. McCoy, the subpoena to the FBI is quashed. If you re-subpoena them under the statute --

MR. MCCOY:

I've already done it, Your Honor.

THE COURT:

Well, if you've done that and it's properly done --

MR. MCCOY:

And it's properly; that's what I'm fixing to tell you you're fixing to quash a subpoena that's already properly vindicated.

THE COURT:

Mr. McCoy, if you interrupt me again, I am going to have you gagged. Do you understand me? So you can talk to me one at a time. We have to record this, I will be very respectful of your time; you're going to be very respectful of mine. All right? If you have re-subpoena them under the proper procedure then you are entitled to do that according to what this letter states. But under the prior subpoena power that you used you did not properly do that. Therefore, it is quashed under the prior subpoena power that you tried to use. If you have re-subpoenaed them and done it in the proper manner then I will look at that at the trial to see if it's been done properly. I will revisit these subpoenas. If they have not been served properly then you have not done it affectively and properly. But I will look at that at the trial. That will be a discussion that you and Mr. English will have to have. I will reserve my right to quash any subpoenas at that time if they have not been given the properly notification. So that is my ruling. You can object to my ruling if you wish to do so. All right, now you can talk if you wish to do so.

MR. MCCOY:

Thank -- thank you, Your Honor. I've also addressed, Your Honor, through your clerk of court office; they have sent me the proper notification on addresses in the proper venue and how to subpoena all my wit-

nesses. And I have a Sixth Amendment right to subpoena my witnesses in the processes in which the D.A. have, I should have the same power that vindicates me by the United States Constitution to subpoena my witnesses

THE COURT:

Mr. --

MR. MCCOY:

And that's the same aspects that I use, Your Honor to unjustly quash the subpoenas from my defense, Your Honor, will be putting me on a direct path to a death penalty aspect, Your Honor.

THE COURT:

Mr. -- Mr. McCoy, I have not stopped you from subpoenaing. I just said, I would look at it to see if the witnesses have been properly subpoenaed at the time. I have not quashed any of your subpoenas.

MR. MCCOY:

But I've subpoenaed it through the aspects of the clerk of court —

THE COURT:

All right.

MR. MCCOY:

— and I have the validation of the records from which the clerk of court has given me.

THE COURT:

I reserve the right -- I reserve the right, Mr. McCoy, to look at everything at the trial to see if it was properly done. Okay?

MR. MCCOY:

Yes, sir.

THE COURT:

So that's what I'm doing.

MR. MCCOY:

Yes, sir.

THE COURT:

So that -- I'm making a reservation of right.

MR. MARVIN:

That's acceptable to the state, Your Honor, and I think that's the only two matters on the docket except for the jury excuses that the Court indicated that it might --

THE COURT:

Yes, sir, I have to go through these jury excuses.

MR. ENGLISH:

That's -- that's -- Your Honor, can I make one more statement before --

THE COURT:

Yes, sir.

MR. ENGLISH:

-- quickly before we start. I think I have to be clear on the record because it's not in dispute that I am not death penalty qualified in this case. But I'm the best Mr. McCoy has. Rather it me than him representing himself. But I want to place on the record, Your Honor, that there has been an opportunity to allow Mr.

McCoy to plea and not face the death penalty and he has openly rejected that against my advice.

THE COURT:

All right.

MR. ENGLISH:

And I want to put that on the record, Your Honor.

THE COURT:

All right, then that has been placed on the record at this time. And I will go through the jury excuses.

MR. MARVIN:

Your Honor, this is a jury excuse, I have already

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EXCERPTS OF JULY 26, 2011 TRANSCRIPT RE MOTION HEARING

* * *

TUESDAY, JULY 26, 2011

MOTION HEARING

THE COURT:

Good morning.

MR. ENGLISH:

Good morning, Your Honor.

THE COURT:

Good morning.

MR. MARVIN:

Good morning, Judge.

THE COURT:

Good morning, Mr. Marvin. All right, Mr. Marvin; Mr. English. Mr. English?

MR. ENGLISH:

Your Honor, I'm present with my client, Mr. Robert McCoy.

THE COURT:

Yes, sir.

MR. ENGLISH:

I asked for a hearing today, Your Honor, because I was informed by Mr. McCoy this weekend that it was his intention to terminate my services.

THE COURT:

Yes, sir.

MR. ENGLISH:

And so, I would turn it over to Mr. McCoy, Your Honor.

THE COURT:

All right, Mr. Marvin?

MR. MCCOY:

Good afternoon, Your Honor. My name is Robert McCoy; I stay in Shreveport, Louisiana at 7323 Altus Loop. Your Honor, we come here today, Your Honor, to petition the Court to terminate my counsel. And we're terminating Mr. English on the aspects of deficiency in counsel. Mr. English has misled my family in numerous amounts of ways. Mr. English has not properly defended me in any aspects of the case. Mr. English has not investigated anything in any matters in this case, Your Honor. I had to get my mom to go on the internet and get information from Idaho Court aspects showing that I never possessed a weapon. I never had a weapon. And as of three years ago statute has been presented in the Court and I would like to present that on the record today. Also to let the Court know and have it on judicial documents that this has been disposed of three years ago proving that I never had a weapon in the Idaho Court through magistrate -- magistrate up there. And this is something that is very relevant to this Court proceeding. And also, Your Honor, I want to present that Mr. English called Ms. Sandra Black, you remember on the twelfth Mr. English made a statement that I didn't have a defense alibi? Mr. English wrote and called Ms. Sandra and told Ms. San-

dra everything up under the sun about this criminal aspect that I had -- had got caught with a gun --

THE COURT:

Mr. McCoy, and let me just stop you again right now. I know that I have warned you a hundred times about Miranda.

MR. MCCOY:

Yes, sir. Yes, sir.

THE COURT:

And you know Miranda probably better than anybody at this time because I have tried to protect your rights in every way that I can, sir.

MR. MCCOY:

Yes, sir.

THE COURT:

And you understand again, that you are stating things are the record that are being recorded. You understand that you have a right to an attorney; you are presented by an attorney. You have the right not to state anything in this courtroom, sir. And you understand that you have the right to remain silent on all of these things. And anything that you tell this Court is being recorded at the present time and can and probably will be used against you at your trial. You understand all of that, sir?

MR. MCCOY:

Yes, sir, Judge Cox, I fully understand it.

THE COURT:

I -- I have to advise you of those rights, Mr. McCoy, because I think that you are stating things on the rec-

ord that you don't need to state. I do try to listen to you, sir, and I -- but I'm trying to protect your rights in every way that I can, Mr. McCoy. So.

MR. MCCOY:

Thank you, Judge Cox.

THE COURT:

All right.

MR. MCCOY:

May I proceed?

THE COURT:

Yes, sir, you may proceed at your own risk, sir.

MR. MCCOY:

Thank you, Your Honor. Your Honor, I would like to introduce into the docket the two case histories in Nez Perce (phonetics) County, Idaho that validates that on 5-13-2008, Providing False Information and Illegal Weapon Carried all was dismissed at that time. And they did a probable hearing up there and it was all dismissed and I would like to, if they bailiff is here, to introduce this into record with you, Your Honor. And it also vindicated and validate that on 5-13-2008, twenty-two hundred hours after eight o'clock the -- the sheriff's office up there released documented information to Mr. Joey Cleveland and the incentive detective's desk was up there and -- after eight o'clock that morning evidence was dismissed. And they'd given him evidence that was dismissed in another state at twenty-two hundred hours, that's ten o'clock at night, Your Honor. And there is a proceeding to everything and I would like to introduce this into record, please.

THE COURT:

Mr. McCoy, I don't know if that is properly before the Court at this time. Mr. Marvin?

MR. MARVIN:

I don't even understand the relevance of that, but --

MR. MCCOY:

It -- it's very relevant, Your honor.

THE COURT:

Mr. McCoy --

MR. MARVIN:

He can present that at trial if he thinks it's relevant in his defense and we may or may not have an objection at that time, but I don't

THE COURT:

Mr. McCoy --

MR. MARVIN:

The purpose of whether or not Mr. English is going to be his lawyer from hereafter --

MR. MCCOY:

No, he's not, Your Honor.

THE COURT:

Mr. McCoy, that's my determination at this point.

MR. MCCOY:

Well with me -- with me paying -- paying for Mr. --

THE COURT:

Mr. McCoy? Mr. McCoy?

MR. MCCOY:

Yes, sir.

THE COURT:

Now, I'm going to be real respectful of you.

MR. MCCOY:

I understand, Your Honor.

THE COURT:

I'm going to be real respectful of you. You're going to be real respectful of me.

MR. MCCOY:

Yes, sir.

THE COURT:

And Mr. Marvin – is -- he goes along and he is respectful to the bench. Mr. English is respectful to the bench.

MR. MCCOY:

Yes, sir.

THE COURT:

We can't talk over each other.

MR. MCCOY:

Yes, sir,

THE COURT:

Because I'm trying to record these proceedings.

MR. MCCOY:

Yes, sir.

THE COURT:

So we're going to be respectful to each other.

MR. MCCOY:

Yes, sir.

THE COURT:

All right. There are determinations that I get to make, all right, sir? I'm letting you make your argument and I'm listening. All right? So, I'm going to rule those are irrelevant. You can present those at trial, Mr. McCoy, if you want to present those as part of your defense but they are not properly before the Court as far as counsel is concerned. You can make the statements regarding those issues but I'm not allowing those to be placed in the record at this time just because they are not relevant to this proceeding, all right, sir? I'm allowing you to save those for trial is what I'm doing. All right. All right, now, you may proceed with any other statements.

MR. MCCOY:

Yes, sir. Your Honor, as I was speaking of my defense alibi, as Mr. English spoke of on the twelfth of this month. Mr. English called my defense alibi, he wrote my defense alibi and told her everything up under the sun, Mr. -- Judge Cox, and that is not validate. He told her I was caught with a weapon. I also have some disciplinary aspect on Mr. English that I turned him into the disciplinary board twice for not doing his, you know, relevant aspects in my case. Mr. English has been on my case for over a year and a half, Your Honor. Mr. English has not done anything relevant to my case. Mr. English has also talked to my parents, them in the back, trying to make them make me cop out to three counts of first degree murder. Didn't want me to go to trial. I consistently told Mr. English we're getting new counsel, Your Honor, we have new counsel on standby

right now to replace Mr. English because this is my life, Your Honor, and to vindicate and keep Mr. English on my case when I know Mr. English is not working in my favor, Your Honor. We will an aspect to put me in the death chambers, Your Honor. I need somebody that's going to work for me, not somebody that's going to vindicate and work for the prosecutor, Your Honor. I need, in this aspect; I need help like any individual in any aspect, Your Honor, that needs help. This is a very vital time in my life, Your Honor, and I need help. I don't need somebody that's working against me, Your Honor. And he's worked against me every step of the way. I respect Mr. English to the fullest but Mr. English has an obligation to represent the guilty as well as the innocent, Your Honor. And Mr. English has not step forward to any of those obligations, Your Honor. Mr. English just showed me the dash cam video that I wrote you and petition the Court for over two years now, sir, and I just seen it Saturday. And Mr. English is steady trying to make me be the person in there when you can't even see the person in the dash cam video. That's what I'm talking about, Your Honor.

MR. ENGLISH:

Your Honor, I'm -- Your Honor -- Your Honor, I'm going -- while I'm still Mr. McCoy's counsel, Your Honor, I'm going to again strongly advise Mr. McCoy that he not discuss conversations between me and him in an open courtroom.

THE COURT:

All right. Mr. McCoy, you stated -- you stated that you have a counsel on standby, is that counsel -- who is that counsel, please?

MR. MCCOY:

My mom and dad has gotten with Mr. Artis Cash, he has two counsels on standby, they said they will enroll as soon as Mr. English is taken out of my case.

THE COURT:

Are they prepared to proceed to trial on Thursday?

MR. MCCOY:

Yes, sir. My mom and dad confirmed it last night and they talked with -- they're ready to -- to proceed in trial on -- once Mr. English is dismissed they're ready to proceed on trial. There will be no del -- no delays.

THE COURT:

They are not here today, Mr. McCoy?

MR. MCCOY:

Not -- no, sir.

THE COURT:

All right, thank you, sir. Anything else you want to state on Mr. -- anything else you want to state to the Court, sir?

MR. MCCOY:

No, sir, other than introducing the disciplinary records at the disciplinary board that I'd presented against Mr. English as well.

THE COURT:

Mr. McCoy, I understand that you've filed a disciplinary proceeding. I understand but that's not -- that is not anything that this Court handles. So I'm just letting you know that --

MR. MCCOY:

But --

THE COURT:

-- ahead of time. I understand and I take you at your word that you've filed a disciplinary proceeding, sir. All right. So I take that into consideration. All right, Mr. English?

MR. ENGLISH:

Your Honor, I mean, if this Court is going to honor his request and let me out of this case, I mean, we have an irrevocable disagreement between how to proceed in this case. If -- if I'm out of this case I ask to be out of the case, that's what I ask for, okay? It's -- it's August and it's hot and I've been here a month now and got a whole other month clear but I have no problem, Your Honor, turning over everything if Mr. McCoy has secured counsel. And if the Court determines that Mr. McCoy has secured counsel I would ask to be relieved out of this case. Mr. McCoy and I have an irrevocable -- he will not talk to me anymore. He's not communicating to me anymore. And, you know, I've never encountered this situation in my twenty years of practicing law but it is what it is. So if the Court is going to honor his request and let me out of this case then I would like to be out of the case, Your Honor.

THE COURT:

All right. Mr. Marvin?

MR. MARVIN:

Well it doesn't work like that.

MR. MCCOY:

Huh?

MR. MARVIN:

You've got to have lawyers here saying, I hereby enroll as counsel then you let him out. I don't know even know who these two people are that he supposedly has. They're mystery lawyers. Nobody knows their names. Nobody has mentioned their names. So they're not here. We start trial the day after tomorrow. I don't know if they're ready. I don't know if they would show up here this afternoon or tomorrow or Thursday and say, I need a continuance. You know, or I need this or the D.A. hasn't given me that. I mean, there are all kinds of things that could happen. But they're not here and if they're here and they say they're ready for trial then we wouldn't be arguing much about any of this. He's free to hire whoever he wants but he's got to hire them and they've got to be -- they're got to step up. So, I mean, I don't think it's proper at all to let Mr. English out, I under -- I understand his predict -- predicament and I'm sympathetic to it but the lawyer has got to be here.

THE COURT:

Okay. Any other argument, Mr. English?

MR. ENGLISH:

None, Your Honor.

THE COURT:

All right, Mr. McCoy, I'll let you have one last bite at the apple.

MR. MCCOY:

Yes, sir, thank you, Your Honor. In --

THE COURT:

And that's with the caution that I've already warned you about Miranda, sir.

MR. MCCOY:

Yes, sir. I just want to bring back to the Court's remembrance when I dismissed Ms. Pam Smart. I didn't have a standby lawyer here then, Your Honor. And when I spoke to you about Mr. English enrolling he enrolled in the same and proper fashion in which, you know, I told you he would enroll, Your Honor. I was creditable of my word. I was creditable of the things that I spoke to you about in that aspect, Your Honor. And I'm still creditable about this aspect. These attorneys have -- are very familiar with this case. They have been standing by and vindicating things with the case; they are very familiar with this case, Your Honor. That's why they're not going to need any continuance hiring for this case; they're very familiar with it.

THE COURT:

All right, thank you, Mr. McCoy. Mr. McCoy, in anticipation of this motion and in looking up the law in this motion, I've looked at the Supreme Court case of State of Louisiana versus Roy Bridgewater that is cited at 823 So. 2d 877 is a Louisiana Supreme Court case that was decided by the Louisiana Supreme Court, June 21, 2002. Mr. McCoy, there have been times that you have been represented by the Public Defender's Office. There was a time that you had attempted to represent -- potentially had talked about representing yourself. There has -- you have been represented by Mr. English. And the case stands for the right -- you do have the right to choose counsel but that counsel cannot be chosen when it is an attempt to obstruct the Court's orderly procedure or to interfere with a fair administration of justice. And it states that (quoted as read) "In order for the defendant to exercise his right to counsel he must exercise his right to counsel of his

choice at a reasonable time, in a reasonable manner, and at an appropriate stage of the proceedings." This matter has been set since February. This matter has been under scheduling order at least two different times. The case was continued by the Louisiana Second Circuit Court of Appeal in February and was continued to this term, which I specifically set aside in order to be able to have this hearing. We are two days before the hearing date. Your counsel, these two gentlemen or ladies or these two attorneys that you state are going to represent you are not in this courtroom at this time. They have not come before this Court and asked to enroll in this case. Even if they were to enroll there would have to be assurances that they were prepared to go to trial on Thursday. So based on the fact that this is not a timely request and this Court also takes into consideration that even if there are irreconcilable differences between counsel and the person that is accused of a crime that the Court said that (quoted as read) "A right to counsel choice must be made in a timely manner. It must be the choice at a reasonable time, and a reasonable manner, and an at appropriate stage of the proceedings." This is not an appropriate stage of the proceedings. There is no counsel that is present today to state that they would enroll. And therefore, I deny Mr. English being relieved at this time and he will remain as counsel of record and this case will go to trial on Thursday.

MR. MARVIN:

Thank you, Your Honor.

THE COURT:

That is under State versus Bridgewater. I do want to quote that again. That is a Louisiana Supreme Court proceeding, January 15, 2002, 823 So. 2d. 877. Okay.

MR. MARVIN:

Your Honor, there is a motion to quash a subpoena that we filed that I think may have been set for Thursday and we're prepared to take that up, do you have -- are you familiar with what --

THE COURT:

I do have the motions to quash the subpoenas. Mr. English, do you have these motions to quash?

MR. ENGLISH:

He's -- he's showing me a copy, Your Honor.

MR. MARVIN:

That's --

THE COURT:

All right.

MR. MARVIN:

Your Honor, that subpoena was issued to Senator David Vitter a United States Senator and served on his office in Shreveport, it was not personally served on him. We set forth a memorandum and other reasons why the subpoena should be quashed. We were contacted by a staff attorney for the United States Senate last -- week before last and his only request was that this be done at the earliest possible time that the Court rule on it. So we've like to take that up and argue it for those reasons set forth in our motion and the memorandum. To our knowledge Senator David Vitter has absolutely no knowledge of Mr. McCoy personally or of this incident. And for those reasons set forth in both our motion and the letter from the senate attorneys that that subpoena be quashed so that I can notify the senator's office of the Court's disposition of this matter.

THE COURT:

Mr. English?

MR. ENGLISH:

I don't object, Your Honor.

THE COURT:

Sir?

MR. ENGLISH:

I do not object.

THE COURT:

All right. Mr. McCoy, --

MR. ENGLISH:

Your -- Your Honor, Your Honor, may I say -- may I -- may I make a statement?

THE COURT:

Yes, sir.

MR. ENGLISH:

Your Honor, I'm going to -- we're now two days away from the beginning of a capital murder trial. I can't represent Mr. McCoy -- I have -- I'm the lawyer at this table and my word has to be the word, Your Honor. I cannot represent Mr. McCoy if the Court allows Mr. McCoy to continually intervene and make statements on this case.

THE COURT:

And, Mr. English, I was fixing to address that at this time.

MR. ENGLISH:

Thank you.

THE COURT:

Mr. McCoy, the Court has determined that Mr. English is your attorney and from today's proceedings forward I've allowed you to talk before this courtroom. From this day forward, and I've given you your Miranda a hundred times, I know that. And I -- I know I've given it numerous times, let me just put it that way. From this day forward since the Court has determined that Mr. English is your attorney, Mr. English will do the speaking to the Court. You will not be allowed except through Mr. English to address the Court from this day forward. Based on the fact that he is representing you and has been determined to be your attorney. You may write him notes. You may discuss this with him at the table. You may make your opinion known to Mr. English. But he has been determined to be your attorney at this point. We are fixing to be starting a trial and this is in order to protect your rights to the best of my ability. So I'm letting you know why I'm doing this but Mr. English has been determined to be counsel of record at this time, sir. So Mr. McCoy, I will let you speak, briefly.

MR. MCCOY:

Thank you.

THE COURT:

But I want you to acknowledge that you understand what I'm saying to you.

MR. MCCOY:

Yes, sir.

THE COURT:

Because I am trying -- sir, I am doing everything in my power. Everything in my power to make sure --

MR. ENGLISH:

Your Honor, I'm going to object any further to allow Mr. McCoy to make any future statements without conferring to me.

THE COURT:

All right.

MR. ENGLISH:

Given the sensitivity of this case.

MR. MCCOY:

Through Ache versus Oklahoma, Your Honor, I have the right to speak, I have a right to represent myself through Ache versus Oklahoma, Your Honor, and too --

THE COURT:

Not at this time, Mr. McCoy, the State versus Bridgewater states that you have unequivocally given up that right because you're not making that right at the present -- you have not made that known to the Court unequivocally before this date. So I will instruct you to speak through Mr. English at this time and we're going to start that Mr. English is your attorney and he will be representing you. Mr. McCoy, I have done everything I can and I am stopping you at this time and allowing Mr. English to represent you. Mr. English, you have no objection to this subpoena being quashed, is that correct?

MR. ENGLISH:

No -- no, Your Know.

(MR. ENGLISH CONFERNING WITH MR. MCCOY OFF RECORD)

MR. ENGLISH:

Your Honor, I have conferred with my client, my client has indicated to me that the State Senator David Vitter knows everything about this case. That he has been involved on the case. That he knows everything about the conspiracy in this case to frame Mr. McCoy and Mr. McCoy believes that State Senator -- I mean, U.S. Senator David Vitter is a key witness in his case. I have no evidence to substantiate that but I'm simply reciting to you what Mr. McCoy has asked me to recite to you, Your Honor.

THE COURT:

All right, thank you. Mr. Marvin, any response?

MR. MARVIN:

Your Honor, if the state is willing to allow Mr. McCoy to recited whatever information he believes Senator Vitter knows able this case and any conspiracy involving this case, and the Court can review that in camera. But without specific information what Senator David Vitter knows about this case we believe the subpoena should be quashed. This is merely to harass the Senator and make some kind of vague allegations about a conspiracy and we just believe that his argument is not enough.

THE COURT:

Mr. English, any final statement, sir?

MR. ENGLISH:

Your Honor, I think at this time, Your Honor, I'm going to ask for an ex parte hearing with this Court. To

put something on the record outside of the defense -- I mean, outside of the prosecutor. I think it's going to go to the core of this case moving forward and I believe I need to make a record, Your Honor.

MR. MARVIN:

Regarding this issuance of the subpoena to —

MR. ENGLISH:

No -- no, not the issuance, Your Honor. Not this issuance. I -- I -- I have no more statements about State Senator Vitter so I'm going to let the Court rule and then I'll make a —

MR. MARVIN:

Okay, well --

MR. ENGLISH:

I'll -- I'll withdraw that, okay? I have no more statements about U.S. Senator David Vitter, Your Honor.

THE COURT:

All right.

MR. MARVIN:

The -- the proper procedures were not followed to -- to subpoena in session and for that reason alone we move to quash the subpoena.

THE COURT:

I do -- I do hereby quash the subpoena as proper procedure was not followed. Mr. McCoy -- Mr. McCoy -- Mr. English, proper procedure was not followed to issue these subpoenas. The subpoena has to be issued under a proper method. That is something that I discussed the other day about the FBI agent. It was not

properly served, I therefore, quash the subpoena as it was not properly served on a sitting United States Senator while he is in session. So that subpoena is quashed.

MR. MARVIN:

Thank you, Your Honor.

THE COURT:

All right, do you have any other motions, Mr. Marvin?

MR. MARVIN:

No, sir, Your Honor.

THE COURT:

All right.

MR. ENGLISH:

Your Honor, at this time I'm going to ask for an ex parte hearing with the Court to discuss my representation with Mr. McCoy. I don't intend that it will take a long time but I think I -- I would like to build a record and then, Your Honor, I'm going to ask that it be sealed.

THE COURT:

Mr. English, that is a -- unusual request and I believe that the district attorney is normally entitled to be in those proceedings. Do you have any authority for your -

MR. ENGLISH:

That's -- that's -- that, Your Honor, that's fine, I put it on the record so now let me -- let me state, Your Honor, and I'm assuming that the Court is turning that down. Your Honor, Mr. McCoy is insistent that I put

forward a defense in this case at the guilt phase of this trial. I have made a determination, Your Honor, that the evidence in this case is so overwhelming against Mr. McCoy that in order to do that --

THE COURT:

Mr. English, I -- I'm not going to interrupt you, sir, I mean, I hate to interrupt you.

MR. ENGLISH:

Okay.

THE COURT:

And I'm -

MR. ENGLISH:

That's why I asked for an ex parte hearing, Your Honor.

THE COURT:

Yes, sir, and I mean, I understand what you stated. I think that you've stated this on the record prior to this date.

MR. ENGLISH:

Okay.

THE COURT:

I believe that -- you are the attorney, sir.

MR. ENGLISH:

That's fine, Your Honor.

THE COURT:

And you have to make the trial decision of what you're going to proceed with --

MR. ENGLISH:

That's fine, Your Honor.

THE COURT:

-- and how you're going to proceed, so.

MR. ENGLISH:

That's fine.

MR. MARVIN:

That's all we have for today, Your Honor.

MR. ENGLISH:

Your Honor, we -- I've -- I have been presented with exhibits that the state intends to introduce and some of these exhibits are crime scene photos and I think we already -- now -- Mr. Marvin and I agree that now is a good time to take this up because I have some objection to some of these photos. I believe that they are unnecessary; I believe they are prejudicial. And I believe that -- that they -- they have no value other than to inflame the jury. And I would like to take up some of these photos, Your Honor.

THE COURT:

Is that agreeable, Mr. Marvin?

MR. MARVIN:

That's fine, Your Honor.

THE COURT:

And, Mr. Marvin and Mr. English, before you leave today, I do have jury excuses that I need to go over to make sure that they're on the record. It will help us be able to proceed on Thursday morning more expeditiously.

MR. ENGLISH:

That's fine, Your Honor.

(MR. MARVIN AND MR. ENGLISH CONFERING WITH THE CLERK)

THE COURT:

Mr. English, are you ready to proceed?

MR. ENGLISH:

Your Honor, just give me two seconds.

THE COURT:

Yes, sir.

* * *

[THE COURT:]

looking at me and then she starts throwing things at me, Mr. English. So, I don't want to get things thrown at me during the trial.

MR. ENGLISH:

That's fine, Your Honor.

THE COURT:

All right, thank you, sir.

MR. MARVIN:

All right, Your Honor, Mr. English has handed me five sets — six sets of photographs that he says he objects to and they are autopsy photographs — two autopsy photographs of Willie Young that show the entry wound to Mr. Young's right' eye. And these are the only two that we would intend to show — offer with regards to Mr. Young's autopsy.

MR. ENGLISH:

Your Honor, the Coroner — may, I — are you — are you — does the Court need to see these pictures, Your Honor?

THE COURT:

Yes, sir, please. All right, sir.

MR. ENGLISH:

Your Honor, again, the Coroner is going to testify as to the crime scene; the cause of death. The state is introducing without my objection the diagram of the autopsy report that specifically shows the entry wounds. Those pictures, Your Honor, have no probative value in their case — this case. Their sole purpose, Your Honor, is to inflame the jury. To allow those photographs to be put in front of the jury, Your Honor, would seriously prejudicial Mr. McCoy's case and I believe, Your Honor, for those reasons they should not

THE COURT:

All right, Mr. Marvin?

MR. MARVIN:

Your Honor, the state's required to prove its case. And these -- and we're required to prove corpus delicti so we — we have to prove that — that the people died. I know that there's no serious dispute as to that but we have to prove it beyond a reasonable doubt. And we intend to call the Coroner — the pathologist, I'm sorry, that conducted the autopsy and let him describe what he found with each one of these victims. And where the bullets went in; if the bullets stayed in the body or where it exited the body. And what the bullet did while it was in the body; what all arteries did it hit. What caused the death of these three individuals. So we're required to prove that. We've picked two photo-

graphs out of numerous photographs taken of the autopsy. With regards to Mr. Young — I mean, I know he's going to argue all of its prejudicial, that's why I'm offering them. But we're required to prove cause of death and that's within our burden of proof and we're entitled to present our case and — and autopsy photographs are always and somewhat prejudicial and many times inflammatory. And I know he's concerned that there's a bullet hole in Mr. Young's right eyelid. And he wished it was somewhere else but its not. He was shot in the right eyelid so I can't take a picture of the man's knee and I can't take a picture of the man's toe tag and offer that into evidence. The Coroner has a right to describe what killed Willie Young.

MR. ENGLISH:

Your Honor, I'm prepared to stipulate what killed Willie Young. I'm prepared to stipulate that Willie Young is dead. The Coroner report, Your Honor, lays out specific diagrams, shows entry points, the whole nine yards. Those photographs serve no probative value in this case other than to inflame the jury, Judge.

THE COURT:

All right, Mr. Marvin?

MR. MARVIN:

I — I mean, the stipulation is not acceptable. This is a death penalty case and we're entitled to put on our case as we see fit, so.

THE COURT:

All right. Mr. English, I understand your concerned but this is a — this is a murder trial. I don't find that these are overly — these photographs — and I will — the only way that I can identify these for the record

— it looks like — I need to be able to identify these for the record. It looks like 0001130001 is the number on the bottom of the photographs and there are two photographs. Are these copies, Mr. Marvin? Are these copies?

MR. MARVIN:

That's Mr. English's copies.

MR, ENGLISH:

Those are my copies, Your Honor.

THE COURT:

Those are your copies?

MR. ENGLISH:

Yes, Your Honor.

MR. MARVIN:

We — we were offered that in a form of a power

* * *

because it's not listed on the—

MR. MARVIN:

Down at that bottom.

MS. NOONAN:

It's a crime scene.

MR. MARVIN:

It's a crime scene photograph; that one's up side down. These are all crime scene photos.

MR. ENGLISH:

Who's the victim in here?

MR. MARVIN:

That's Christina. That's Christina. That's Willie. And that's Willie. The first two are of Ms. Young; the second two are —

MR. ENGLISH:

Your Honor, I'm going to introduce what I'm — I'm labeling as D-3, 4, 5 and 6. They are crime scene photos, two are of Mr. Willie Young and the other one is Ms. Colston. I object to the same objection, Your Honor, that I've already stated on the previous photos.

MR. MARVIN:

Your Honor, those are crime scene photographs of two of the victims. We would — actually our first witness in this case would probably be Sergeant Buddy Eagle. He — Sergeant Eagle is the individual that responded to the crime scene and he's going to describe those photographs as being the — accurate depiction of the — the residence as he entered the residence. And a short while later Detective Sage Allen of the Bossier PD actually took those photographs and he would be one of our next witnesses that would identify what's depicted in that photograph as being accurate as what they saw in that residence the night of May the — May the 5th, 2008.

THE COURT:

All right, Mr. English?

MR. ENGLISH:

Your Honor, again, I — the same objection, Your Honor, I believe that those pictures are prejudicial. I don't believe they have any probative value that's in this case. The police officers can describe what was in

the case and I would ask Your Honor that they not be allowed to be presented to the jury.

THE COURT:

I would state that these are not overly prejudicial at this point, Mr. English, and based on their offering at the trial on whether there's any other objection to them at the trial. I would allow them to be presented so I'll overrule that objection to these photographs.

MR. ENGLISH:

Thank you, Your Honor. Your Honor, next we object to which we're going to list as D —

MADAM CLERK:

What are —

THE COURT:

These are D-3 —

MADAM CLERK:

And you're allowing them?

THE COURT:

I will allow them to be presented, yes, ma'am.

MADAM CLERK:

Okay.

THE COURT:

D-3, 4, 5, and 6.

MADAM CLERK:

Does he got them labeled?

THE COURT:

Yes, ma'am, he does on the bot — right there on the top. Okay.

(EXHIBITS D-3 THROUGH D-6 WILL BE ALLOWED AT TRIAL)

MR. ENGLISH:

Your Honor, next I'm going to — what I've listed as Defense Exhibit Seven and Eight; they are emergency room pictures of Gregory Colston. They are graphic, they clearly have no probative value in this case other than to inflame the jury. The Court is allowing the crime scene photos. There are crime scene photos showing Gregory Colston lying in a pool of blood. I've not objected to those photos but to allow photos in of Mr. Colston — Mr. — victim in the emergency room, Your Honor, with tubes running out of him and doctor's pointing at him that's clearly probative, has no probative value in this case as to whether or not a crime was committed. The sole purpose of these photos, Your Honor, is to inflame the jury and prejudice them against Mr. McCoy.

THE COURT:

All right, Mr. Marvin?

MR. MARVIN:

Your Honor, we don't really want to try our whole case now and — and describe what our witness is going to testify to but basically what is in the — their report would be Sergeant Eagle when he entered the residence heard a gurgling sound. And he's going to describe that in detail what he heard. It's not going to be good for this man's defense. It's not intended to be for his defense. But Mr. Colston, Gregory, lived a little while and he didn't die a quick death like the other two

did. And the jury's entitled to know what happened in that residence that night. And again, Mr. Colston, we're required to prove the cause of his death. And the Coroner's entitled to describe how and why he survived the time that he did.

MR. ENGLISH:

But showing, Your Honor, Mr. Colston on an operating table with tubes running out of him, removed from the crime scene has no probative value in this case. The D.A. has more than enough evidence, and by the way, Your Honor, again we're prepared to stipulate to all of this evidence. The D.A. has crime scene photos. They have the testimony of police officers.

They have the testimony of the Coroner to allow these photographs to be brought in where the individual has been removed from the crime scene, Your Honor, has absolutely have no value. It doesn't in anyway help the D.A. to prove their case. The medical testimony is what is it. Those photos, Your Honor, clearly prejudicial against my client and should not be allowed in.

THE COURT:

I'll take those — I'm going to take a minute to render a decision on that. I'll pass those for just a minute. Do you have any others, Mr. English?

MR. ENGLISH:

Your Honor, I believe those are all the ones that we have, Your Honor.

THE COURT:

All right.

MR. MARVIN:

You gave me these?

MR. ENGLISH:

Wait, I'm sorry, that has — I'm sorry, I gave you these. Okay, let's go. Yes, I definitely have some more, Your Honor.

MR. MARVIN:

Okay. These are two —

MR. ENGLISH:

I've got them, Your Honor. These are two autopsy photos which we're going to — I believe we're up to D-9 and D-10.

THE COURT:

That is correct, yes, sir.

MR. ENGLISH:

These are autopsy photos of Gregory Colston, Your Honor, again Your Honor, there's crime scene photos in this case. Those pictures are inflammatory, they have no probative value, Your Honor, and they only serve to prejudicial the jury against Mr. McCoy in this case. And those are autopsy photos, Your Honor.

MR. MARVIN:

Well for the same arguments we made earlier these are just three of the autopsy photographs. Each of these individuals have probably fifteen to twenty photographs made of them and I can't help the fact that Mr. McCoy shot the kid between his eyes.

MR. ENGLISH:

I'm going to object to that there's no evidence, Your Honor, that Mr. McCoy at this point shot anybody.

MR. MARVIN:

But that's what the photographs show and that — I understand his argument is made in every single death penalty case that's ever been tried and we — we're — we intend to present our case and carry our burden of proof and this is part of it.

THE COURT:

Mr. English, I will allow these photographs as I do not find them to be overly prejudicial; they will be allowed to be presented with your reservations of objections at the trial, sir.

(EXHIBITS D-9 AND D-10 WILL BE ALLOWED AT TRIAL)

MR. ENGLISH:

Your Honor, we're now going to move to what we're going to list as D-11, D-12 and D-13, these are autopsy photos of Ms. Mary Colston. I believe again for the same arguments, Your Honor, they're prejudicial, they have no probative value in this case, and they should be stricken and not allowed to be presented to the jury. Same arguments, Your Honor.

MR. MARVIN:

Your Honor, these are photographs of Christine Colston's autopsy —

MR. ENGLISH:

Same photos.

MR. MARVIN:

That's the same photos, and while the pathologist is testifying regarding her cause of death we think they would enable the jury to visually see the wounds that he's describing and what injury was caused by those

wounds. So for the same arguments that we've already made we believe they're relevant to our case in chief.

THE COURT:

I do not find that these photographs are — are overly prejudicial, I'll allow D-11, 12 and 13 with reservations of rights by the defense.

(EXHIBITS D-11 THROUGH D-13 WILL BE ALLOWED AT TRIAL)

MR. MARVIN:

And, Your Honor, with regards to those emergency room photographs that you've taken under advisement, we don't intend to offer those. So I think his objection will be moot; we're going to withdraw those at this time.

THE COURT:

All right, then those are withdrawn at this time.

MR. MARVIN:

Yes, sir.

THE COURT:

I'm going to place them in the record just to —

MR. MARVIN:

That's fine.

THE COURT: make sure that the record complete. D-7 and D-8 will not be presented at the trial. The state has withdrawn those at the — at this time. And that objection would be moot to that.

(EXHIBITS D-7 AND D-8 WILL NOT ALLOWED AT TRIAL)

THE COURT:

Mr. English, do you have anything else, sir?

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EXCERPT OF AUGUST 1, 2011 TRANSCRIPT RE VOIR DIRE

* * *

THE COURT:

All right, thank you, ma'am.

(MS. MCCONNELL ESCORTED OUT OF COURTROOM)

THE COURT:

I'm going to take that one under advisement for just a minute just to do a little research on that one because I mean Ms. McConnell has stated that she could place anything that she knows about this case aside and look at the evidence. You know, I believe in her demeanor and looking at her I believe that she would be able to do so. And I believe that she was forthright in her answers and that she did not hesitate in stating that she could place — place anything that she knew about this case aside.

MR. ENGLISH:

May I just respond briefly, Your Honor?

THE COURT:

Yes, sir.

MR. ENGLISH:

The stakes are too high, Judge. She's formed an opinion in this case. The stakes are too high.

THE COURT:

And, Mr. English, I am weighing that and that's why I am hesitating to just state that I would — would

not let her off for cause. I am weighing that because I know that the stakes are high in this situation and I will take it under advisement for about five minutes. I am going to let y'all do your peremptories in just one minute and when I come back I want to write down the ones that we have excused so that I can make sure of where I'm at.

MR. ENGLISH:

Thank you, Your Honor.

MR. SHERIFF:

Five minute recess?

THE COURT:

Five minutes.

MR. SHERIFF:

Court's in recess for five minutes.

(COURT RECESSES)

(COURT RECONVENES)

THE COURT:

All right, let's go back on record, please. All right, Deputy, are we back on record?

MR. SHERIFF:

You may remain seated. Court is in session.

THE COURT:

All right, Mr. Marvin is present. Mr. English is present, along with Mr. McCoy. After looking at the cases, after considering prior excuses for cause, Ms. Thomas was excused because she knew the victims in the case and knew matters about this case. She was

excused earlier. Mr. Burrell, his wife had taught at Parkway High School and he had gone to Stonewall Baptist Church. He said that his wife had taught the young man that was involved in this case and that he went to Stonewall Baptist Church. Ms. McConnell stated that she got the facts from an officer and that she had already formed an opinion about this case even though she stated that she ones that we have excused so that I can make sure of could place that opinion aside. But taking into consideration that we have excused these others, Ms. Thomas and Mr. Burrell, then I will excuse Ms. McConnell based on the seriousness of the nature of this case. So, I will excuse Ms. McConnell for cause.

MR. MARVIN:

We'd like the State's objection noted for the record, Your Honor.

THE COURT:

All right. Noted for the record.

(MS. MCCONNELL - EXCUSED - CAUSE - DEFENSE)

(OBJECTION TO COURT'S RULING NOTED FOR THE RECORD)

THE COURT:

All right, now, can I have your peremptories, please. Ms. Lang, which — has she already been accepted, Mr. Marvin?

MR. MARVIN:

The very first panel.

THE COURT:

All right. So, Ms. Lang —

MR. MARVIN:

She actually was the very first one.

THE COURT:

Yes, sir, she is in Seat No. 1, is that correct?

MR. MARVIN:

I believe so.

THE COURT:

All right. So, Ms. Lang is back-struck. That is seven for the State. Ms. Butler.

MR. MARVIN:

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EXCERPT OF AUGUST 2, 2011 TRANSCRIPT
RE VOIR DIRE

* * *

MR. MARVIN:

Yes. And I can produce my police report as evidence. I have to make a copy of it, but –

THE COURT:

All right, so — All right, Mr. English.

MR. ENGLISH:

I'm the lawyer in this case. None of that evidence is before this Court. He didn't ask her anything about whether or not she had had any conversations with her — with this pastor. He had every opportunity to ask her have you had any conversation with your pastor about this case. Do you know any facts about this? She said she did not know any facts about this case. The mere fact that some individual who is in a police report she may — she knows to be her pastor and she has absolutely no facts or evidence about this case is not a viable reason for striking her. This is — Mr. Marvin is - There is a clear pattern of striking African-American jurors off of this panel and the reasons that he gives, Your Honor, are not sufficient. He, in no way, on his examination in any way connected her to Mr. McGee, did you have any knowledge of Mr. McGee, do you know whether or not Mr. McCoy has accused Mr. McGee of anything. The only thing she said was he's my pastor. That's all.

THE COURT:

All right.

MR. MARVIN:

Judge, she also said she would tend to believe her pastor.

MR. ENGLISH:

Well, the pastor's not — her pastor is not a witness in this case. The pastor hasn't been called and you know —

THE COURT:

Mr. English.

MR. ENGLISH:

And you know that he hasn't been called to trial. I apologize, Judge.

THE COURT:

Mr. English.

MR. ENGLISH:

I apologize. I'm zipping it.

MR. MARVIN:

Your Honor —

THE COURT:

Mr. English, I expect Mr. Marvin to respect you. I expect you to respect Mr. Marvin. When he's talking you'll listen. When he — you're talking, he's going to listen. And when I'm talking y'all are going to listen.

MR. ENGLISH:

I apologize, Judge. I've got my hand over my mouth.

THE COURT:

All right. I apologize, Mr. Marvin. You may proceed, sir.

MR. MARVIN:

All right. And just for the record not five minutes ago I was the one fighting to keep an African- American on this jury. So — and we have African- Americans on this jury. And I can — I'm going to make a copy of this police report and submit that if I can when we take a recess where he — And I'm pretty sure there's other places in here where he was referenced. I also intend on offering those subpoenas that were ordered by Mr. McCoy pro se, Madam Clerk. And I know those are in the record, but I'm 95 percent sure that there was one in there to him. And if I — if I'm wrong about that — but I also intend on submitting a — Hold on one second. Okay, let me make sure. I don't want to say something that's wrong. Yeah, I would — I would submit another statement from a fellow inmate of Mr. McCoy's named Joshua Paul Disotell, taken 3-3 of '09, where he summoned the police to his house — I mean to the prison and gave a statement which has been transcribed that said Mr. McCoy — the detective asked Mr. Disotell, "So he was upset at his wife?" The inmate answered, "He was upset at his wife because he caught his wife several different times cheating on him." Question: "Did she — did he say with who?" Answer: "Yes, sir, he said, uh, it was Officer McGee, for he's a — he goes — he goes to church or he's the pastor or goes to the same church as his wife." So, there's more than one entry into this case investigation that involves Richard McGee. So, I don't have — I — I would not have — Had — If that's not her pastor and she doesn't know Richard McGee she would not be being stricken. But he is her pastor. He's her pastor for five years. She said she would tend to believe him. And with the allegation against him —

And I'm trying to anticipate exactly what's going to happen in this trial with Mr. McCoy's subpoenas and things that are — that are coming. And we haven't addressed all those and we, I think, kind of agreed to — to take it as it came by the trial. But those are my reasons for striking Ms. McWashington.

THE COURT:

All right, Mr. English, I'll let you argue again.

MR. ENGLISH:

I would just — I would just make a move that everything he's written about what some inmate says is hearsay, Your Honor. None of that is in front of this Court. The assumption of it is Mr. — Mr. McGee is simply — his name is in a police report. He didn't in any way — if he felt so concerned about that he should have examined her on that. He didn't examine her on that and now when I made the Batson challenge he reaches into the piles and throws it up on the table. Why didn't he — why didn't he examine her on that? But, for the reasons stated, Your Honor, I believe that — I'm moving for a Batson challenge.

THE COURT:

Mr. English, I believe that Mr. Marvin has stated a race-neutral reason. Batson does not require anything but a race-neutral reason to be stated for the record. He has stated more than one reason that this juror knew this officer in this case; that the officer's name has come up before in this case. I do not remember — And I apologize. I do not remember if a subpoena was issued for Mr. — for Officer McGee. There have been numerous subpoenas that have been sought by Mr. McCoy, which I stated that we would take up during the trial and look at their necessity. But the juror did

completely say or, excuse me, did say that she would believe Officer McGee. And that is a race-neutral reason and, therefore, I will allow her to be stricken at this time.

MR. ENGLISH:

Object for the record, Your Honor.

THE COURT:

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EXCERPTS OF AUGUST 3, 2011 TRANSCRIPT RE GUILT PHASE OF TRIAL

* * *

MR. ENGLISH:

Your Honor, I have some serious concerns about my client's – my client's emotional –

THE COURT:

This is – Is this going to be on record, Mr. McCoy? I mean Mr. English?

MR. ENGLISH:

You can – You can put it on the record, Your Honor. Let's put it on the record.

THE COURT:

All right. Mr. English, I've already – All right.

MR. ENGLISH:

I have some serious concerns about my client, Your Honor, and my client's emotional state in this trial. I have repeatedly attempted to tell Mr. McCoy that I cannot engage – given the level of evidence in this case engage his fantasies in this case. Mr. McCoy is angry at me. I am deeply concerned about Mr. McCoy and his behavior and his ability, Your Honor, to function in this trial. Mr. McCoy and I are not communicating. We are not – So, to instruct Mr. McCoy to communicate through me – Mr. McCoy believes, Your Honor, that I am in cahoots with the District Attorney to send him to the death chamber. And I am attempting to do my job. This is very difficult. And I need to say to the Court I am concerned about Mr. McCoy and Mr. McCoy's abil-

ity to sit in this courtroom and function as I've stated numerous times, Your Honor.

THE COURT:

Mr. English – Mr. McCoy, I am not – at this time I have ruled that you are represented by an attorney. I will not entertain any statements by you. This is a statement that you are – you have been represented by Mr. English. Sir, it has been determined that you will be represented by Mr. English. You will communicate through Mr. English. I will not take any chances on you making a statement, sir, that jeopardizes your right in this courtroom at this time, sir. And I have warned you numerous times. I let you have those statements as of last Tuesday when we had the argument regarding you removing your attorney and at that point in time I told you that you would be able to speak through your attorney; that you were represented by Mr. English. I will make that a part of the record. Mr. McCoy, we are in trial proceedings at this time. Any other outbursts – I will warn you again that if I have to remove you from this courtroom I have no problem in removing you from this courtroom. You will be able to hear the proceedings. You will be in a spot where you can hear the proceedings so that you can hear the testimony, but you will not be a disruption to this courtroom, sir.

MR. McCOY:

I understand, Judge Cox. But he didn't subpoena –

THE COURT:

Mr. McCoy.

MR. McCOY:

– any of my witnesses, Judge Cox. How can I –

THE COURT:

Mr. McCoy.

MR. McCOY:

– have a defense, Judge Cox –

THE COURT:

Mr. McCoy.

MR. McCOY:

– when he hasn't subpoenaed any of my witnesses.

THE COURT:

Mr. McCoy, I understand that. You will be able to discuss that with Mr. English.

MR. McCOY:

He –

THE COURT:

Mr. McCoy, I have made my ruling at this time, sir.

MR. McCOY:

Yes, sir.

THE COURT:

Do not disrupt the courtroom again. We have done – Mr. McCoy, you have done very well up to this point. Do not ruin that at this time. Sir, these people are making the judgment. I am trying to protect your rights in every way that I can, Mr. McCoy. So do not make any comments or do not disrupt this courtroom where I have to remove the jury again because I have a difficult enough job in trying to make sure that everything is done properly and I am trying to protect your rights in every way that I can, sir.

MR. McCOY:

Judge Cox, they deserve to know the truth. They're presenting one side of the story here, Judge Cox. He hasn't –

THE COURT:

Mr. –

MR. McCOY:

– subpoenaed not one of my witnesses, Judge Cox.

THE COURT:

All right, Mr. McCoy, I will let you take that up with Mr. English, but do not disrupt the courtroom is what I –

MR. McCOY:

I will not.

THE COURT:

– is what I'm –

MR. McCOY:

I will not, Judge Cox.

THE COURT:

– what I'm telling you, sir.

MR. McCOY:

Yes, sir.

THE COURT:

You can't be turning around talking to people in the audience.

MR. McCOY:

Yes, sir.

THE COURT:

All right?

MR. McCOY:

Yes, sir.

THE COURT:

So, please, do not do that again.

MR. McCOY:

I will not.

THE COURT:

All right. Thank you, sir. Mr. Marvin, I apologize I had to interrupt your opening, sir.

MR. MARVIN:

No problem. No problem.

THE COURT:

All right. Mr. English, are you ready to proceed, sir?

MR. ENGLISH:

I'm ready to proceed, Your Honor.

THE COURT:

And, Mr. McCoy is present. Please bring back in the jury.

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED INTO THE COURTROOM)

MR. SHERIFF:

All jurors are present, Your Honor.

THE COURT:

You may be seated. Mr. Marvin, you may proceed, please, sir.

MR. MARVIN:

Thank you, Your Honor. Okay, ladies and gentlemen, when we broke a moment ago I was discussing with you specific intent and the elements of first degree murder. Again, specific intent basically means you have to intend to do what you did. You can't do it by accident or erroneously. And, again, I would argue to you that not one, not two, but three people shot between the eyes shows a specific intent to kill. All of you were questioned during the voir process. All of you have different levels of education, different marital situations. Some, your kids are grown, some have young kids, but you've all got one thing in common and that's why you were picked. You've got common sense. I'm not going to be up here asking you to leap out into the darkness with the hope that something sticks. This is not a hard case. Common sense is all you'll need to conclude that Robert McCoy committed these murders and convict him of first degree murder. Now, just to back up a bit. You will hear from Detective Humphrey and he will tell you about various aspects of the case that he – that he handled, but it just so happened in addition to the items that Officer Szyska found in that white car that night that I can prove to you indicates Robert McCoy was the operator of that vehicle. In addition to that Detective Humphrey will tell you that the paper plate, license plates on the car, didn't belong to that car. It was registered to some other car, different make, model, color, everything. But when he ran the VIN number, the little stamp on the – on the motor and on different parts of the car, the car is registered to – Who

do you think? To Robert and Yolanda McCoy. Now, at this point as I stated, Mr. and Mrs. Young are being cut open by the pathologist to determine where is the bullet, what killed them. And it is – it is common sense to know that if someone gets shot between the eyes with a pistol that's what killed them. But I have to do more than that. I've got to prove that that caused their death. In some cases you can argue– If there's a car wreck, for instance, and a car runs off of Interstate 20 and runs right into a concrete bridge railing and the person in there is dead, you say, well, they died from the car wreck, right? Well, maybe. But they could have had a heart attack and that caused them to run into the bridge railing. So, this is not a car wreck case, obviously, but I have to prove exactly what killed them. So you will hear from Dr. Traylor from LSU about all three autopsies that he performed on Mr. and Ms. Young and young Gregory. And he will tell you in his expert opinion – and the judge will tell you what – who experts are. And in all kinds of lawsuits, both civil and criminal, lawyers can call a witness that will classify as an expert. And if this were a civil jury, for instance, and the – the issue was you hired a contractor to build you a home or a business and the roof fell in, you would call an engineer as a witness. And the witness would – could testify, well, the roof – the roof trusses were defective, they didn't have them far enough apart or had them too far apart and that's what caused the roof to fall in. And an expert witness in any situation is simply someone that can help the jury understand technical things. And they are people that are learned in a particular field. So a pathologist is someone that will qualify as an expert witness that can you tell how he or she – and experts are allowed conclusions. But they – they can tell you – he will tell you how he concluded that these bullets are what killed these three people. And

that – that may sound very, very, like, why in the world do we have to know that. If you shoot three people in the head, good God, I know – you know, I know. But I have to prove it. It's within my burden of proof. And I'll tell you or apologize to you now because there may be questions that I ask that you think are the totally stupidest questions, why, look, Lord, we don't need to know that. We – I already know that. The man's a doctor or a pathologist or whatever. But I don't know what's going through all of your brains. It's impossible for me to know that. So if I ask a question once or if I ask a stupid question once or a simple question two or three times it's because I have to know that you know what the answer to that question is because I can't assume it. All the time we try jury trials and at the conclusion of the trial, win or lose, both sides usually might want to go talk to the jury and say what did you think about such and such, what did you think about – you know, how did I do. Some lawyers say how did I do. Am I good lawyer? Did you like me? Did you not like me? But you'll find out things from juries like, golly, I didn't know. I sure didn't know they were thinking that. So that's – again, I'll just apologize for that because I may do that during this trial and ask a stupid question. All right. Now, immediately after all of this happens Detective Humphrey and other detectives with him begin a massive, massive search for Robert McCoy's whereabouts because he's – he's gone. And Judge Cox will tell you in your – in your closing charge, the final charge, the fact that Robert McCoy fled, the fact that he bolted out of that car and ran– Now, I'll get to how he was caught because it's – it's pretty good stuff. You're going to like it and you're going to be proud of your police department. But Judge Cox will tell you about flight. Evidence of flight, concealment and attempt to avoid apprehension is relevant. If you

find that the defendant fled immediately after a crime was committed or after he was accused of a crime, the flight alone is not sufficient to prove that the defendant is guilty. However, flight may be considered along with all the other evidence. You must decide whether the flight was due to consciousness of guilt or to other reasons unrelated to guilt. Ladies and gentlemen, Robert McCoy didn't ditch his car, jump over a six- or eight-foot fence and run through a drainage ditch and run across I-20 in busy traffic and escape because he wanted to get to the other side of the road. He was running because the cops were after him because he had just committed three murders. So, Detective Humphrey will tell you what all transpired in the coming days. Now, I'm going to leap ahead just a minute. You will hear from a police officer named – Just a minute. You will hear from a police officer named Craig Roberts. Okay. I never met the guy yet, but he's here and he's a police officer on a police force in Lewiston – the Lewiston PO, police department in Lewiston, Idaho. Okay. And so, I know you're thinking what in the world does that have to do with this case. Well, Officer Roberts was contacted by the Bossier Police Department and the United States Marshal's Service, who was assisting the Bossier Police Department, while he was on duty in Lewiston, Idaho, because the Bossier police had learned –And you'll hear great details of how they learned that – that Mr. McCoy was the passenger in a Swift 18-wheel truck – 18-wheeler truck. Swift Company is the name of the trucking company. And they learned that Mr. McCoy had switched – he had hitchhiked with one truck and had switched into this Swift truck at a weigh scales station. And the driver of the truck that Mr. McCoy had been riding in prior – immediately prior said, well, he got into a Swift truck and I don't know much about it, but I know at the weigh

scales the truck got a ticket, an overweight ticket; that he, you know, remembered that. So, Detective Humphrey called the weigh scales station and said how many tickets did y'all write on this date and they told him and they were able to narrow it – narrow it down to a Swift Truckline truck. So, the Bossier City Police, along with the U.S. Marshal's Service, gets on the phone and calls Swift Truckline Company. I don't know where they're based out of. And said y'all got a truck, this is the truck number, they had the ticket at that point, the weight ticket, and the Swift company has GPSs in their trucks and they said our truck's in Lewiston, Idaho. What in the world would y'all want with our truck in Lewiston, Idaho. So, after explaining the situation they were able, through GPS, to say our truck's driving right down Elm Street in Lewiston – or whatever street in Lewiston, Idaho. So, in comes Officer Roberts and other officers of the Lewiston Police Department. So they pull this truck over. Guess what? You're going to get to see a video of that from their dash cam. So they pull this 18-wheeled truck over in a little bitty town in Idaho and there's the driver of the truck. He has no idea what's going on. He's merely given someone –given Mr. McCoy a ride. So, the police officers make their stop, both the driver and occupant are pulled from the vehicle. Guess who the occupant is? Robert McCoy. He's in Lewiston, Idaho. You will hear Officer Roberts tell you what he found after he pulled Mr. McCoy from that 18-wheeled truck. And you will see video of some parts of it. It's obviously just a stationary camera located on the dash of his police car. But guess what he found in the – right behind the passenger seat of the 18-wheeler? He found a pistol. A .380 caliber pistol. Now, before Mr. – Officer Roberts testifies you will have already heard testimony from a young lady at the crime lab named Carla White. She

works at the North Louisiana Crime Lab in Shreveport. And she will have testified by that point that she has recovered bullets and bullet fragments from each of these three bodies and that she tested them and test fired the .380 caliber gun that was recovered in Idaho in the truck that Mr. McCoy was a passenger in and will – She, as an expert, will have made a conclusion – And this is just like you see on TV, CSI – that's the gun that fired the bullets that killed the three people. So, other witnesses you will hear from will be identifying other forms of evidence. I think you'll find this case interesting. I think you'll think– that you'll agree that it will flow pretty quick. The other things the State will prove to you when Officer Szyska stopped the vehicle in the passenger seat of the – of Mr. McCoy's vehicle was a cordless telephone. I don't mean a cell phone. A cordless telephone. And a cordless telephone that you have in your house, you know it will work in your house and to some extent out in your yard, but once you get away from the handset or the base set, it doesn't work anymore. So, that item of evidence – I have it right here – you will see Officer Szyska recovered that and he'll tell you where he found it. And when Detective Humphrey was able to take it back to the residence where two dead bodies and one dying body were – was located, and you put that cordless handset on the base station at the Young residence it works. When you find the other cordless phone and the base station at that residence the serial numbers match up exactly. So, ladies and gentlemen, that's proof that Mr. McCoy was in that house. I ask you to listen carefully to all of the evidence, the evidence that Mr. English may produce. And I'm required, I'm mandated, I have to get up here and tell you what my case is about. Mr. English does not. And he may or may not make an opening statement. I don't know that. But if he does, listen carefully

to everything and every witness and piece of evidence that he admits because I told you in the voir dire process wait until the end to make up your mind. Wait until the end to make up your mind. But you will hear a lot of evidence here and everything that the police department did and how they did it. You will hear from a representative of Wal-Mart and you will see a video of Wal-Mart where Mr. McCoy walks in Wal-Mart on 5-5 of '08, the day of the homicide, and purchased a pack of bullets. You want to guess what caliber they were – .380. Hmmm. You will see that video tape of that purchase and the representative from Wal-Mart will authenticate the video, as well as the receipt that was found in the white car for the bullets on 5-5 of '08. I told you in voir dire it's been eight and a half years since I was elected district attorney. This is the first time that I have stood before a trial jury and said this is a death penalty case. I don't know how many murder cases we've tried. I don't how many murder pleas we've taken. But it's been a lot. This is a death penalty case. And it – the first order of business is to convict Robert McCoy. Judge Cox stated a moment ago he does start the trial with a clean slate. He sits there an innocent man. He's an innocent man who's murdered people, but he's innocent at this point. Give him the benefit of the doubt, but at the conclusion of this trial I will be asking you to convict Robert McCoy of three counts, not one, not two, but three, counts of first degree murder because the facts of this case will indicate to you beyond all reasonable doubt that he is guilty of that charge. Thank you.

THE COURT:

Mr. English.

(ENGLISH - OPENING STATEMENT)

MR. ENGLISH:

Good morning, ladies and gentlemen. I'm going to say to you probably for the fifteenth time, my name is Larry English and I represent Mr. Robert McCoy who is sitting at this table. As a lawyer, as a defense lawyer, we are trained to make the State prove every piece of evidence that it wishes to interject into a trial. In this case I cannot stand in front of you because of what the stakes are in this case and lie to you or tell you any differently that the District Attorney can prove every fact that he has just alleged to you. There is no way reasonably possible that you can listen to the evidence in this case and not come to any other conclusion than Robert McCoy was the cause of these individuals' death. But that's not the only issue to be decided. First degree murder requires that there be specific intent — specific intent to kill those individuals. The State cannot put on any evidence that Robert McCoy ever made any malice statement towards those individuals; that those individuals was ever on his radar to do harm. Robert McCoy is crazy.

MR. McCOY:

What?

MR. ENGLISH:

Robert McCoy is crazy. He meets the legal definition of competent, but evidence will be put on in this case that Robert McCoy suffers from emotional and mental issues that affects his ability to make decisions in this case.

MR. McCOY:

Judge Cox, may I be excused?

THE COURT:

Mr. McCoy. Stop, Mr. English. All rise, please.

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED OUT OF COURTROOM)

THE COURT:

You may be seated. Mr. McCoy, this is your second warning. I've warned you not to make any statement in front of this jury. I'm warning you at this time. Your attorney is making his argument at this time. You are represented by Mr. English. This is your second warning. If you make any other outbursts I will remove you from the courtroom to a conference room where you can hear the proceedings, sir. You may have a disagreement with Mr. English, but he is representing you at the present time. You have made your statements known as of last Tuesday. I have already previously warned you about this, Mr. McCoy. I've warned you one time this morning about discussing this in the audience. I will warn you again, do not make any outbursts in front of the jury. If you do make any outbursts in front of the jury or disrupt this trial in any way, I will remove you from the courtroom. I do have the case law that supports that, sir. I will let you know that on the record at this time. I do not want to do that, Mr. McCoy. You have -- you have been at that table during all proceedings and this is the first time that we have had any outbursts. I understand, sir, that you may disagree with Mr. English's approach. You may discuss that with him at any break.

MR. McCOY:

Judge Cox, Mr. English is simply selling me out, Judge Cox. They know cops killed these people, Judge Cox, and you want me to sit here, Judge Cox, and just

let this man throw away all aspects of my due process. I have told you about Mr. English, Your Honor. I tried to get Mr. English removed, Your Honor, and you still kept Mr. English on my case, Your Honor, when I told you Mr. English was not putting up any type of defense for me. He's sitting there vindicating, Your Honor, that I murdered my family. I did not murder my family, Your Honor, I had alibis of me being out of state. Your Honor, this is unconstitutional for you to keep an attorney on my case when this attorney is completely selling me out, Your Honor.

THE COURT:

Mr. McCoy, we have had this discussion. We -- Mr. English is representing you.

MR. McCOY:

I don't want him to represent me, Your Honor.

THE COURT:

Mr. McCoy -

MR. McCOY:

I told you that a week ago.

THE COURT:

Mr. McCoy, I'm not going to have any other outbursts. If you're not going to sit at that table -

MR. McCOY:

May I be removed, Your Honor?

THE COURT:

You may be removed to the conference room, sir, where you can hear. Oh, Mr. -- Mr. -- Deputy -- Deputy, he has to remain. All right, Deputy, he has to remain at the table, please. Mr. McCoy, this time I'm go-

ing to give you one more warning, sir. If you continue to disrupt this courtroom, I will remove you after that disruption, sir.

MR. MARVIN:

Your Honor, we are having a little bit of technical difficulty with the video, but –

THE COURT:

Mr. Marvin, after – after Mr. English finishes his closing – I mean his opening statement I'm going to take about a fifteen-minute recess –

MR. MARVIN:

Okay, that's fine, sir.

THE COURT:

– to allow y'all to –

MR. MARVIN:

That's fine.

THE COURT:

– to do that and give Mr. McCoy a break and Mr. English a break and go from there. Can we proceed at this time, Mr. Marvin, please?

MR. MARVIN:

Your Honor, if – Okay, yes, sir, if we can take that fifteen-minute break at the appropriate time that would be fine.

THE COURT:

I am going to take a fifteen-minute recess at that time. Mr. English, are you ready to proceed, sir?

MR. ENGLISH:

Yes, sir, I am, Your Honor.

THE COURT:

Mr. McCoy, I've warned you. Please do not violate that warning, sir.

MR. McCOY:

Yes, sir.

THE COURT:

Thank you, sir. Please rise for the jury. Please bring the jury in.

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED INTO COURTROOM)

MR. SHERIFF:

All jurors are present, Your Honor.

THE COURT:

You may be seated, please. All right, Mr. English, I apologize for interrupting, sir. You may proceed, sir.

MR. ENGLISH:

Ladies and gentlemen, when we were disrupted I was saying to you, and I will say to you again, that a reasonable person cannot look at this evidence without coming to any other conclusion than Mr. Robert McCoy was the cause of these three peoples' deaths. That is the facts in this case. The facts in this case are overwhelming and the District Attorney can prove this case. But that's not enough. This is a first degree murder trial. And the District Attorney has to prove specific intent. We believe that the evidence will show that because of Mr. McCoy's emotional and mental con-

ditions that this is a second degree murder trial. This is not a first degree murder trial. Dr. Mark Vigen will testify in this case. Dr. Mark Vigen will testify that Robert McCoy suffers from serious emotional issues that inhibits his ability to function in society and to make rational decisions. That evidence will be in this right -- and we talked about that. The evidence will show that on at least six occasions Robert McCoy attempted suicide. He's so wracked with guilt about this case that he has attempted to kill himself six times. The evidence will show that. Mr. McCoy -- The evidence will show that he believes he did not commit these murders. The evidence will show that Mr. McCoy believes that everybody in this courtroom, the judge, the district attorney, myself, the Bossier Parish Police Department, the Idaho Police Department, we are all in a conspiracy to kill him. Mr. McCoy -- The evidence will show that Mr. McCoy has seen this evidence that you will see in this courtroom. It is unambiguous. This is not easy for me as a district attorney (sic) to stand in front of a jury and tell you in a capital murder case that my client committed three murders, but the evidence that will be put on that screen, that will come from that stand will say that he did it. Mr. McCoy has seen that evidence, but yet he -- in all of his soul he does not believe he committed these crimes. Mr. McCoy -- Dr. Vigen will give you medical terms. And again, I admit the evidence is clear Mr. McCoy has been judged to be legally competent to stand trial. But in layman terms, Mr. McCoy is crazy, ladies and gentlemen. Mr. McCoy is not here with us today. Mr. McCoy -- The record will show and the evidence will show that Mr. McCoy believed that his wife was having an affair. He was fixated on it. He was fixated on that she was having an affair. And the evidence will show that Mr. McCoy didn't go there to kill Christine Colston or Gregory Colston or

Willie Young. The evidence will show Mr. McCoy had no -- had never ever shown any malice or anything toward those three people. Mr. McCoy went there looking for -- the evidence will show he went there looking for Yolanda --Yolanda Colston and she wasn't there and something happened and he snapped. Because at the end of the day, ladies and gentlemen, although the evidence is overwhelming that Mr. McCoy caused the death of these people, the evidence is also, ladies and gentlemen, that Mr. McCoy had no malice against those people. He snapped in that house when he couldn't find Yolanda and he killed those three people. Mr. -- The evidence will show that Mr. McCoy lives in a fantasy world; that every time he's confronted with an issue he constructs a fantasy and he keeps -- and it goes from level to level to level to level. And when he's telling you that fantasy he believes in it. He believes in it. Robert McCoy has rights in this case. I've just told you he's guilty, but Robert McCoy has rights in this case. I will try to conduct this trial in a way that does not disrespect the victims in this case or waste your time. But the law requires that I have a duty to protect Mr. McCoy's rights. Now, Mr. McCoy believes I sold him out. Mr. McCoy believes that I am in a conspiracy with the judge, Mr. Marvin and the police to kill him. That's not what my job is here today. My job is here today is to insure that Mr. McCoy's rights are protected. Now, Mr. Marvin has indicated to you he's going to ask you -- he's going to be asking stupid questions. And he's going to ask questions over and over again because he don't know whether or not you will believe and understand. That's not why Mr. Marvin -- Mr. Marvin is a skilled lawyer. That's not why he's going to be asking those questions. He's going to be asking those questions because he wants to inflame you. He wants through this trial to put on evidence and to make

statements and to ask questions that are going to inflame you and blind you so that you cannot do your duty in this case. And your duty in this case will be to listen to the evidence. Your duty in this case will be to listen to all of the factors in this case and make a determination. So, guess what? Mr. -- Mr. Marvin doesn't have any more pressure on him. I'm telling you Mr. McCoy committed these crimes. But the issue is whether or not in this phase of the trial that Robert McCoy is guilty of first degree murder. And I say to you that he is not. I say to you that Mr. McCoy is a damaged human being that cannot function among us and his mental and emotional state is a mitigating factor in this case. You will hear evidence in this case that will challenge your humanity and everybody else's humanity in this case. You will hear evidence about a sixteen-year-old child killed. And it will be gut-wrenching. It will be gut-wrenching. But the law requires a duty of you as you listen to the evidence in this case. It's okay to cry. It's okay to feel for the victims in this case. But we live in a country that says, "And justice for all." That's the country we live in. That's why we're here. That's why we're here. It doesn't matter that this evidence is overwhelming. And it is overwhelming. The law requires for us to come here today and the next several days to stand in judgment of this man. And we don't take people out and shoot them or cut their heads off because we believe in justice for all. I will do my best to conduct this trial for my part in a way that does not waste your time; that does not cause this family any more harm. And sitting on that back row is Mr. McCoy's family also. But I have to protect his rights and we have to get through this. And all I ask you is as difficult as it is, is to hold on to your humanity when you watch these pictures; to hold onto these humanity -- your humanity when you hear the

evidence in this case and remember you have to judge the facts and look at every aspect of this trial. Thank you.

THE COURT:

At this time, ladies and gentlemen, I am going to take a fifteen-minute recess. I will give a fifteen- minute recess. If you need to go downstairs for a break, for a smoke break, please take that at this time. And we will be back promptly in fifteen minutes.

MR. SHERIFF:

All rise for the jury.

THE COURT:

Ladies and gentlemen, before you leave -- Y'all go ahead, please.

(JURY ESCORTED OUT OF COURTROOM)

THE COURT:

All right, just one minute, please. Mr. Marvin, when we come back I intend to sequester the jurors -- I mean, well, sequester the witnesses, put them under the

* * *

CROSS-EXAMINATION [OF KARY SZYSKA]

BY MR. ENGLISH:

Q Officer, I have a few questions for you.

A Yes, sir.

Q The — the police video in exhibit — and I forgot which one it was. Was it Exhibit 1? Were you able to positively identify Robert McCoy as —

A Well —

Q — I'm sorry.

A Continue.

Q Were you able to positively identify Robert McCoy as the individual that was fleeing the vehicle?

A I could not.

Q On any of the items that were found in the car did you retrieve any prints from them?

A No, sir, that's — that's above and beyond what I would do. Our ID department would.

Q Did you touch every item in the car without gloves on?

A Yes, sir.

Q Does protocol require you to wear gloves all the time?

A No, sir.

Q Did you get a print off the Wal-Mart receipt?

A I did not, no, sir.

Q And can you say positively that Mr. McCoy was ever fleeing the residence?

A Can I say positively he was fleeing the residence?

Q Yes.

A I can't positively say it. The vehicle was fleeing the residence.

Q I'm sorry?

A The vehicle was fleeing the residence.

Q Okay. Thank you.

* * *

CROSS-EXAMINATION [OF GARY WAYNE ROBERTS]

BY MR. ENGLISH:

Q Good morning, Officer.

A Good morning.

Q My name is Larry English. I represent Mr. McCoy. I have a couple of questions for you. Could you positively say that Mr. McCoy was the person that Ms. Colston was talking about?

A No, I can't. I can't identify — ID him or identify him.

Q And do you consider a first-name basis to identify a person or the whole name to identify a person?

A As to what?

Q Do you consider that the first-name basis — you can use the first-name basis to identify a person or would you need the whole name to identify the person?

A The whole name.

Q And so can you possibly say that Ms. Colston was talking about Robert McCoy?

A I can't positively say that.

Q And so can you say — stating that if Mr. McCoy — Can you — Do — Can you — can you state whether or not Mr. McCoy was present in the apartment at the time?

A I can't say he was present.

Q Okay. And when did you turn the 911 tape over to the police — over to the district attorney's office?

A I didn't turn it over. Our administrative offices they contact them, they make the recording and they turn it over.

Q Hold on just a — One more question, Officer. Hold on. My last question. Is it fair to say that one should look at the whole situation before they — before they decide judgment?

A Yes, sir.

Q Thank you.

THE COURT:

* * *

MR. ENGLISH:

I have just a few questions for you Mr. McCoy wants me to ask you, sir.

CROSS-EXAMINATION [OF ALVIN EAGLE, JR.]

BY MR. ENGLISH:

Q Have you ever seen Mr. Robert McCoy before?

A Not that I remember, sir.

Q Did Detective Humphrey tell you upon arrival at the location that Mr. McCoy committed this crime or he said Mr. McCoy committed this crime?

A No, sir.

Q Didn't they find drugs in the residence and drugs in the Colstons' – Didn't they find drugs in the Colstons' residence?

A I have no knowledge if any were found.

Q Didn't they remove marijuana from the kitchen table that was either smoked or unsmoked?

A I have no knowledge of that either, sir.

Q Did you or any other officer take the gun casing shells right after the collection? Did you — did you keep the gun casing shells after — after they were collected?

A I did not collect any evidence other than the photographs that I took.

Q Isn't it fair to say that on or about 5-7-09 only the victims' clothing was turned in with — with one fired bullet?

A I have no knowledge of that, sir. The only knowledge I have is what happened at the scene itself. Everything after that as far as the crime scene, detectives, and all, I have no knowledge of any of that.

Q I have just a few more questions. Why wasn't the shell casings turned into the crime lab after direct collection to save the expense of tainting the evidence?

A I have no knowledge of that, sir.

Q Has Bossier City always held evidence of a crime scene for fourteen days?

A I have no knowledge of that either, sir.

Q Can you explain to us why it took the police fourteen days to turn in very crucial evidence?

A I have no knowledge of that either, sir.

Q Didn't the police department initially say that a drug deal went bad at this residence and that was the cause?

A I have no knowledge of that either, sir.

Q Do you know Robert Thomas?

A Not that I know of, sir?

Q Do you know that he's an ex-Bossier Sheriff's deputy?

A I don't know him, sir.

Q Do you know — Don't you know that he has been investigated as a known drug dealer and trafficker?

A No knowledge of that either, sir.

Q And are you aware that you are under oath today?

A Yes, sir, I do.

Q Thank you.

THE COURT:

Any redirect, Mr. Marvin?

MR. MARVIN:

Just briefly, Your Honor.

* * *

CROSS-EXAMINATION [OF JAMES G. TRAYLOR]

BY MR. ENGLISH:

Q Doctor, my name is Larry English and I represent Mr. McCoy and I have a couple of questions – actually, Mr. McCoy wanted me to ask you a couple of questions. Can you determine – Are you able to determine by any way by what you – Let me ask this. Can you determine the height of the shooter by any of the evidence that you have evaluated?

A I cannot.

Q Did you – Was there any – Did you find any illegal substance in Mr. Willie Young?

A Yes.

Q What did you find?

A He had two drugs – If you'll allow me to refer to my report?

Q Go ahead.

A Well, let me rephrase my answer. I'll began – You asked me about illegal substances. The only illegal substance that was present in Mr. Young was some marijuana.

Q Well, I – I'm only – my only interest of it is did you find any marijuana in Mr. – in Mr. Young?

A Yes.

Q Okay. Could you tell how much?

A I think the report stated 22 nanograms per milliliter and that was whole blood.

Q That doesn't mean anything to me. I'm sorry.

A Well, there's – Some marijuana is better than others. The active metabolite is Delta 9 Tetrahydrocannabinol. It's called THC. So the report or the testing company gives a range of the active ingredient from like 1.75 to three point something. And they say that if the individual smokes within a few minutes the range can be from 50 to 250 nanograms per milliliter in the whole blood. Mr. Young's level was 22 nanograms per mill. I don't know how strong the marijuana – the marijuana was that he smoked, but there – there's also a metabolite which is called Carboxide Tetrahydrocannabinol which was not present. So that tells me that he actively – probably you could say safely within thirty

minutes to an hour have smoked some marijuana. The active ingredient is present. There's not a whole lot of it, but there is metabolite present. So that kind of tells me that he recently smoked a joint. That's about all I can say.

Q Thank you, Doctor.

MR. MARVIN:

Just a couple of redirect upon that issue, Your Honor.

THE COURT:

Yes, sir.

* * *

CROSS-EXAMINATION
[OF KEVIN HUMPHREY]

BY MR. ENGLISH:

Q Officer Humphrey, my name is Larry English and I represent Mr. McCoy. You were leading the investigation -- the homicide investigation, were you leading for Bossier?

A Yes, sir.

Q And you were leading the team that was attempting to capture Mr. McCoy?

A Yes, sir.

Q And when Mr. McCoy was captured in Idaho were you informed of that?

A Yes, sir.

Q And you were in constant contact with the Idaho police, I'm assuming, while Mr. McCoy was there?

A I don't understand that question.

Q I mean were you -- were you in regular contact with them?

With the Idaho police once Mr. --

A Yes, sir.

Q Once Mr. McCoy was apprehended, were you in regular --

A Yes, sir, we would speak periodically.

Q Okay. Are you aware of -- were you ever informed by the Idaho Police Department that Mr. McCoy attempted suicide?

A Yes, sir.

Q Do you recall what you were told?

A He attempted to hang himself.

Q He attempted to hang himself. You were told that by the Idaho Police Department?

A I believe so.

THE COURT:

Mr. English, you need your microphone.

MR. ENGLISH:

I'm sorry. I need to come to the microphone. I'm sorry.

Q Do you recall talking to an Officer Richard Smith? Does that name ring a bell to you? From the Idaho Police Department.

A I talked to somebody. I don't know who it is.

Q Okay. Did they tell you that Mr. Smith -- that Mr. McCoy was found hanging from a sheet in his jail cell?

A Yes, sir.

Q Does that sound familiar with you?

A Yes, sir.

Q Do you -- did they tell you that Mr. McCoy was unconscious?

A Yes, sir.

Q And that he was rushed to the hospital?

A Yes, sir.

Q Okay. And do you recall being told that Mr. McCoy was put on suicide watch?

A Yes, sir.

Q And did you help facilitate the extradition of Mr. McCoy back to Bossier Parish?

A I supplied the District Attorney's Office with --

Q You were -- you were -- you were involved -- you were --

A -- with the paperwork.

Q You were aware of that transaction is what I'm asking.

A Right.

Q And were you present when Mr. -- when Mr. McCoy was brought back to Bossier Parish?

A No, sir.

Q Were you aware of that when Mr. McCoy was brought back to Bossier Parish he was put on suicide watch?

A No, sir, not that I know of.

Q How long did you continue to be involved in the -- in the investigation in this case?

A The last time I actually had any physical action was when I got the DNA swab from Mr. McCoy.

Q Okay. Are you aware of that Mr. McCoy when he was subsequently incarcerated here in Bossier Parish he attempted suicide again? Were you aware of that?

A I was told that.

Q You were told that he did attempt suicide. You were told that he had swallowed razor blades?

A Yes, sir, I was told that.

Q Were you told that Mr. McCoy had attempted a third suicide --

MADAM COURT REPORTER:

Mr. English.

MR. ENGLISH:

I'm sorry.

Q Mr. McCoy attempted a third suicide --

A Yes, sir.

Q -- where he swallowed -- I believe one of the officers indicated he swallowed either tissue or one officer said the Bible or something like that?

A The Bible?

Q He swallowed paper.

A Oh, I'm not aware of that one.

Q Okay. Did you ever during your investigation determine whether or not Mr. McCoy had ever made any threats toward Willie Young?

A I – I've never talked to Mr. McCoy.

Q No, that's not what I'm asking you. I'm asking you a totally different question. I'm saying you were involved in the homicide investigation –

A Right.

Q – correct?

A Right.

Q During that investigation did you ever determine any evidence that Mr. McCoy had ever made a threat – had ever made any violent threats towards Mr. Willie Young?

A Mr. Young never told me that.

Q Okay. During your investigation of Mr. McCoy did you ever determine that Mr. McCoy had ever made any violent threats against Ms. Christine Colston?

A She didn't — she never said anything about — about threats.

Q And during your investigation did you ever determine whether or not Mr. McCoy had ever made any violent threats toward Gregory Colston?

A No, sir.

Q Hold on just a second, Officer. Officer, I'm sorry, I have a few more questions for you. When you – when Mr. McCoy was – did you ever state to Mr. McCoy after he was arrested that you would do what-

ever it takes to put his name on television in the worst way imaginable?

A No, sir, I did not.

Q Did you – did the police report state that you told the Shreveport Police Department that a man six-foot-one, 160 pounds - - 160 pounds, bright skin, was the alleged – was the alleged assailant that committed the murders? Did you ever tell that to the Shreveport Police Department?

A I didn't. I don't –

Q Did an eyewitness to – that saw the individual fleeing the scene give a description of a black man that was 6'1", 160 pounds and bright skin? Do you recall that?

A No, sir.

Q Did you ever tell Mr. McCoy that he was a snitch and you were going to kill him?

A No, sir.

Q Thank you.

MR. MARVIN:

* * *

CROSS-EXAMINATION [OF CARLA WHITE]

BY MR. ENGLISH:

Q Mr. McCoy has asked me to ask you some questions. But before I ask you those questions, my name is Larry English and I represent Mr. McCoy in this case. How many bullets did you – How many bullets did you – that were actually pulled from the crime scene did you actually make a determination was shot from that weapon?

A I'm not exactly sure the location they were recovered from.

Q Right.

A But total I examined two bullets.

Q Two bullets?

A Yes, sir.

Q I think they were listed as 2 and 18 on the evidence report, correct?

A Yes, sir. My No. 2 and my No. 18.

Q Okay. All right. And you don't know which victim they were – those bullets were pulled from, do you?

A Actually, my – my report – my report does not state that, but I do believe the item of evidence may possibly list where they had come from.

Q All right, thank you. In – in your work do you look for DNA or are you – Do you look for DNA on – on weapons?

A No, sir, I do not.

Q Okay. All right. You don't look for fingerprints?

A It's – I do have the – I am able to do that. In this particular case it was not asked of me to do so.

Q You were not asked to look for fingerprints on that weapon?

A No, sir.

Q I mean you don't know who actually fired the weapon, correct?

A That would be correct.

Q Do you remember when Mr. – Do you remember receiving these — those — the bullets from Mr. Allen, Sergeant Allen?

A I don't actually receive the evidence from the submitting representative. We have an evidence technician who receives the evidence. The evidence technician then places the evidence in my custody, my custody locker actually, which is where I then received the evidence from.

Q Okay. Thank you.

A Yes, sir.

Q Can you tell whether or not the gun was shot more times than was stated in the police reports?

A No, sir, I don't have any way to tell that.

Q Do you know — did you determine who — who the weapon was registered to?

A I do not have that information.

Q Okay. Again, you have no idea or way of showing who shot the weapon?

A That's correct.

Q And, again, you just stated you have a — what's called an evidence technician that receives all the evidence from the -from the various law enforcement agencies?

A Yes, sir.

Q Last question. Did you — Were you — Do you fingerprint the cartridges on the bullets?

A I did not.

Q Okay. Were you requested to do that?

A I do not believe so.

Q Okay. All right. Thank you.

THE COURT:

Any redirect, Mr. Marvin?

MR. MARVIN:

None. Thank you, Ms. White.

THE COURT:

* * *

GAYLE BERNARD HOUSTON

**CALLED AS A WITNESS
BY COUNSEL FOR THE STATE,
WHO, AFTER HAVING BEEN DULY SWORN,
WAS EXAMINED AND TESTIFIED AS FOLLOWS:**

DIRECT EXAMINATION

BY MR. MARVIN:

Q Would you state your name and spell your last name for us.

A Gayle Bernard Houston, H-o-u-s-t-o-n.

Q Okay. Mr. Houston, do you know Robert McCoy?

A Yes, I do.

Q How do you know Mr. McCoy?

A A childhood friend.

Q Okay. So you've known him all your child and adult life?

A I would say so.

Q Do you see Mr. McCoy in the courtroom?

A Yes, I do.

Q Can you point him out?

(WITNESS INDICATING DEFENDANT)

MR. MARVIN:

Okay. Your Honor, we would like the record to show that he identified the defendant.

THE COURT:

Let the record so reflect.

Q Mr. Houston, I'm going to take you back to May of 2008, specifically a day -- Wait a minute -- on May the 5th, 2008, or possibly May the 6th, 2008, did you see Robert McCoy?

A Yes, later on that night. you come into contact with Mr. McCoy?

A I'd say it was just downtown. That's all I can say. It was just downtown.

Q Okay. Was anyone else with him?

A Yes.

Q Who?

A No. No, just him.

Q Okay. Was there anyone else with the two of y'all?

A Yes.

Q Who?

A Me and his brother.

Q And his brother?

A Uh-huh.

Q Okay. When you saw Mr. McCoy that night was he visibly upset to you?

A He looked normal to me.

Q Sir?

A He looked normal to me.

Q Okay. He didn't seem like he was upset or emotional about anything?

A No.

Q Okay. Did you go with Mr. McCoy – Did you go to pick up Mr. Robert McCoy?

A Yes.

Q Okay. Who went?

A His brother and my brother.

Q Okay. And where did y'all pick up Robert McCoy at?

A Downtown. I don't know the name of the street.

Q Okay. But not at any business, not ant any nightclub or not get Robert?

A No. His brother sounded upset and, so, me and my brother we just decided to see what was going on.

Q Oka. And did Robert end up getting in the vehicle with – with you?

A Yes.

Q Okay. What, if anything, did Robert say when he got in the car?

A Basically, he was just quiet and -- and then eventually he just said, you know, he "F'd" up and we was all trying to figure out what -- what you done "F'd" up. And, I like I say, he looked normal to me.

Q Okay. What did he say when you say he "F'd" up, what did he respond?

A Nothing because later on -- you know, it was -- it was hard to say.

Q Okay. But Robert didn't seem emotional to you?

A No, he just looked normal -- normal.

Q Mr. Houston, I'm going to give you a statement. Do you remember giving a statement to Detective Brian Griffith on May the 8th, 2008?

A Yes.

Q Can I give you a copy of that and let you look over it for a minute or two?

A All right.

Q Thank you.

THE COURT:

All right, Mr. Marvin, are you ready to proceed?

MR. MARVIN:

Okay.

Q All right. So, Mr. Houston, does that refresh your memory of the statement you gave back on May 8th of 2008?

A Yes.

Q Okay. So, I'm going to start somewhere on about the third page. Did you tell Detective – Detec-

tive Griffith that you picked up Robert around the train tracks by the Holiday Inn motel?

A I believe so.

Q Okay. Is that right?

A I believe so.

Q All right. And you were asked what Robert said and you kept saying — you told us a minute ago, "I F'd up", and you — down toward the bottom of that page you said — you said the same thing three times, "I F'd up, I F'd up, I F'd up." Okay.

A Uh–huh.

Q Do you recall saying that?

A Yeah.

Q And you told Detective Griffith that Robert was sitting in the back seat with you, correct?

A Yes.

Q And the two other individuals were in the front?

A Yes.

Q Then on the page following that the detective asked you what did he say about what he did besides he just "F'd" up? The top of the page.

A Yes.

Q Okay. And what did you tell the detective?

A I said he done shot three people.

Q He told you that?

A That's the part where I'm kind of confused because later on that night — later on that night when I

went to work I remember talking to his brother because I was trying to figure out what in the world done went down because my daddy called and said, you know, Robert done shot three people and stuff.

MR. ENGLISH:

I object to that statement as hearsay, Your Honor, and I ask that it be stricken.

THE COURT:

I'll sustain and strike.

Q Mr. Houston, I'm only asking what Robert said to you. Not what your dad or his brother said to you, okay?

A Uh–huh.

THE COURT:

Excuse me, Mr. Marvin, the jury is told to disregard that last statement.

Q Okay. And at the — at the — around in the middle of that page you said, "He wouldn't explain why or he — he just wouldn't explain nothing. He just said that he shot three people. I done F'd up. I'm not going back to jail, Gayle." That's you, right?

A Yes.

Q "Robert, you need to turn yourself in." "I'm not going back to jail." Do you remember him saying that to you?

A I — Like I said, I believe — you know, like I said, from the time, you know, is that I don't know did he say that to me or, you know, or did I — had I talked to his brother because like I say, you know, I — the on-

ly thing I can tell you that I know for fact is that he just said that he just "F'd" up.

Q Okay.

A Now, you know, like I said, when I'm doing my statement, you know, I — I been drinking and I could have everything backwards.

Q Really?

A Yeah.

Q You don't think that your statement that you gave back in May the 8th, two days after this happened, was more accurate than what you're testifying to this jury today?

A The only thing I'm saying is that, you know, he did say, you know, that he "F'd" up, but that's all he said. And he wouldn't explain what he had F'd up.

Q Okay. Do you see at the bottom of that page where the detective asked you a question and your answer said, "I believe that" — It's the very next to the last — "because he said he's not going to jail. That, well, you know, the only thing I can think of is that you must be fixing to kill yourself." It's on the next page. That's the paragraph right there, the last one where you answered "Uh, I believe that." Would you read that?

A Are you saying — where you're saying somebody will take — take his life"?

Q Yes. Or after that.

A What you want me to read that?

Q Yeah. The question — the answer that you gave that begins with, "Uh, I believe that." Can you read it out loud?

A "Uh, I believe that once the police back him in a corner 'cause he said he's — he's not going to jail, that's, well, you know, the only thing I can think of is that you must be fixing to kill yourself."

Q Okay. How many times did he say that night, Mr. Houston, that he F'd up?

A I would say probably about three — three times.

Q How was it that you came to pick him up at some train tracks in downtown Shreveport the night of June the 5th?

A His brother — and like I say, we were coming up the street, his brother was crying. Me and my brother was trying to see what was going on and he didn't know what was going on and so we decided to jump in the car with his brother.

Q Okay. Where did y'all take Robert?

A As far as I know that we got on interstate, went down Linwood and after that I — I don't know.

Q Okay. But I mean did you drop him off at a residence or somewhere?

A I don't know.

Q You just wasn't paying attention?

A No, I wasn't paying attention.

Q Did you drive him to another state or did you just drive down, did you say Linwood?

A Just Linwood.

Q Okay. And at some point down Linwood just let him out?

A I believe so. The next thing I know that I was back home. Me and my brother we were back in my mother's house and Spartacus was in the driveway and I was heading out to work.

Q Okay. Where do you work, Mr. Houston, or where did you work then?

A I work at Foremost Dairy.

Q Okay. And you've known Robert all your life?

A Yes.

Q All right. Mr. Houston, you have a criminal history, do you not?

A Yes.

Q Okay. You have a conviction for Misdemeanor Battery?

A Yes.

Q And is that all? Other than traffic tickets?

A That's all I can think of it.

Q Okay.

A You know, a fine or something.

Q Sir?

A A fine.

Q What, you paid a fine on the battery?

A Uh, resisting arrest or something way back.

Q Oh, okay, I'm sorry. Do you have a charge of Misdemeanor Interference With a Police Officer?

A Yes.

Q And that's – you paid a hundred dollars and fifty – a hundred dollar fine and court costs of $76.00?

A No, three hundred and some-odd dollars.

Q Was that – Okay. Well, does it sound more accurate to say that you paid a hundred dollar fine on that charge, $76.00 in court costs and a hundred dollars on an obstruction of an officer charge. That would be $276.

A Yeah, I would say so.

Q Anything – any other run-ins with the law other than that? Other than traffic tickets? I see you have some traffic tickets on your record.

A No.

Q Okay. Okay, thank you, Mr. Houston. Mr. English may have some questions for you.

THE COURT:

Mr. English.

CROSS-EXAMINATION

BY MR. ENGLISH:

Q Good evening, Mr. Houston. My name is Larry English and I represent Mr. Robert McCoy. You indicated in your testimony that when you – when y'all picked Robert up that night he was normal, correct?

A Yes.

Q Do you have the statement in front of you?

A Yes.

Q I'm going to read it to you and I can point it out. Question: "Did you – did – did he tell you where he shot them at?" And your answer was: "No, when we picked him up, I could still remember, you know, he was crying. He was crying." Do you remember telling the police officers that?

A Yes.

Q And so, is your testimony – After reading this statement do you still say Robert was acting normal or was he crying that night?

A He was acting normal.

Q So he wasn't crying?

A You know, crying and – Basically, he was just normal – normal to me.

Q Okay. So, listen, I mean I don't care which one, okay. All right, now, so –

THE COURT:

Mr. English, make sure your mic – Mr. English, make sure –

MR. ENGLISH:

Let me get my mic. I'm sorry.

Q I don't care which one.

THE COURT:

Wait to make sure your microphone's on.

MR. ENGLISH:

Let me put my microphone on. I'm sorry. Hold on, I'm going to put my mic on.

Q Now, let me ask you again. On a direct question from Mr. Marvin, you stated that Mr. McCoy was acting normal, correct?

A Yes.

Q But in your statement to the police you told him he was crying, correct?

A Yes.

Q Which one was it?

A Crying.

Q He was crying?

A Yeah.

Q And you stated on one of your answers and Mr. Marvin asked you about that is that I believe he– he's going to try to take his life or he wants somebody to take his life. Do you remember telling the police officers that?

A Uh, I don't know.

Q This is your statement, right?

A Yeah.

Q Okay. And so, the answer – Do you have any reason to dispute that you told the police officers that night that's on this piece of paper? Are you denying that you told the police officers that I believe that he's going to try to take his life or he wants somebody to take his life? Do you remember making that statement?

A No, I can't remember.

Q Okay. The fact that you don't remember making that statement are you – Let me ask this differently. Are you denying making that statement?

A No, I just can't remember.

Q Okay. All right. And you were subsequently asked when you say somebody take his life what do you mean? You said I believe that once the police back him in a corner because he said he's not going to jail, that, well, you know, that the only thing I can think of is that

you must be fixing to kill yourself. Do you remember telling the police that?

A I believe that's when I talked– I think I was talking to his brother and we had a conversation once we found out that –

Q No. No, this – this statement was taken on 6-04-08, okay?

A Uh-huh.

Q At nine o'clock. That's wrong? Okay, I'm looking at – I'm looking at what I have here on my things.

MR. MARVIN:

That's the date of the–

MR. ENGLISH:

Okay. All right. I apologize.

MR. MARVIN:

The very first line of it was taken – No, I'm sorry.

MR. ENGLISH:

It was taken 6-04-08, okay.

MR. MARVIN:

It was taken May the 8th.

MR. ENGLISH:

I'm sorry.

Q All right, I'm sorry. I'm looking at it right here. It was taken 5-08. I apologize. That was – you gave that statement three days after you had come in contact with Mr. McCoy.

A Uh-huh (affirmative).

Q Now, I'm going to ask you again did you say to the police that – that you believed that Mr. McCoy said he wasn't – that he wasn't going to jail and that you know the only thing that I can think of is that you must be fixing to kill yourself? Do you remember giving that statement?

A I can't remember.

Q Do you deny giving the statement?

A No, I don't deny it.

Q Okay. All right. Now, hold on a second, Mr. McCoy's got some questions he wants me to ask you. Let me – let me – let me – let me ask you a question because I think it's important to put this on the record. Were you ever threatened with being charged in this case?

A As far as –

Q Let me ask you this directly. Did the Bossier City Police Department threaten to charge you with accessory to a capital murder in this case?

A Yeah, I was going to be charged with accessory. Yes.

Q That's what they told you?

A Yes.

Q Okay. And you subsequently gave a statement, correct?

A Yes.

Q Now, did you lie to the Bossier – What you said in this statement, now, even though you don't remember it, did you lie to the police department?

A No.

Q All right. Now, Mr. McCoy, wanted me to ask you some questions. Did you tell Robert's father that the detectives coached you to make all of these statements and the subsequent – Well, everything that Mr. McCoy – that Mr. Marvin has stated that you said in this statement and I've said that you said in this statement, Mr. McCoy wants to know did you tell his father that the detectives had coached you and you made all of this up?

A No.

Q Okay. Mr. Houston, you indicated that you were drinking, correct?

A Yes.

Q And the – the – This is a legitimate question. The fact that you were drinking, would that have clouded your recollection in any way of what Mr. McCoy did or did not do?

A No, because –

Q Well, it – Go ahead. I'm sorry.

A I would say no because –

Q Let me ask you this question.

A All right.

Q Was – was Robert's brother upset? Spartacus?

A Yeah.

Q And didn't you – and didn't you tell the police that Spartacus was crying?

A Yes.

Q Did you tell the police that?

A Yes.

Q So even though you were drinking these – you would not – you tried to recollect as much as you could?

A Yes.

Q Did – did Mr. McCoy help you get a job at Foremost Dairy?

A Not that I know of.

Q And the last question Mr. McCoy wants to ask you is that is it safe to say that you just don't remember because you were drinking?

A I would say to some – to some extent.

Q So, I'm going to – so you don't – so what you told the police is not correct because you don't really remember and you were drinking? Is that what your testimony is now?

Q No. I would say some of the things that I – that I did – that I mentioned was correct I believe.

MR. ENGLISH:

No further questions.

* * *

SHARON MOORE

CALLED AS A WITNESS
BY COUNSEL FOR THE STATE,
WHO, AFTER HAVING BEEN DULY SWORN,
WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. MARVIN:

Q would you state your name, please, ma'am?

A Sharon Moore.

Q Ms. Moore, I know you don't want to be here, is that right?

A That's right.

Q Do you —

THE COURT:

You've got to speak up, please, ma'am.

Q I'm sorry. Do you spell your last name, M-o-o-r-e?

A Yes, sir.

Q How do you know him?

A I met him at the casino.

Q Okay. Did he — you and he have a relationship back in '08?

A Yes, sir.

Q Okay. Ms. Moore, did — did Robert McCoy contact you on or about the afternoon of May the 5th of 2008?

A Yes, sir.

Q Okay. What did he want?

A Like what?

Q I said what did he want? What did he ask you for?

A What did he ask me for?

Q When you talked to him did you talk on the phone or did you talk in person?

A In person.

Q Okay. What did Mr. McCoy ask you to do for him?

A Well, he asked me to buy him some bullets because he — he stayed at my house that Sunday night.

Q Okay. What did you say about bullets?

A He asked me to buy him some bullets.

Q Did he want —

A He said he was going on a — he was working on the railroad and he needed the bullets because he was going in a bad neighborhood to work in.

Q Okay.

A And he needed the bullets. And I —

Q Okay. Did he — did he — did he try to borrow money from you to buy bullets or did he ask you if you had any bullets?

A Uh-uh (negative). He asked for money.

Q Okay. And did you give him any money?

A No, sir.

Q Okay. And he told you that he needed bullets because the train that he worked on went in a bad neighborhood?

A Uh-huh (affirmative).

Q Okay. What happened after that?

A Well, after that he — my mom, she called and she wanted me to take her to Wal-Mart. So he took me to my mom's house and dropped me off and we went to Wal-Mart and he left.

Q Okay. What time — what — what Wal-Mart was that?

A In Minden.

Q The one in Minden. Okay. Did — did he talk any more about bullets after that conversation — first conversation you told us about?

A Uh-uh (negative).

Q Okay. When was the next time you heard from Robert?

A Well, he called me that next night and wanted to come back up to the house to see me. And, well, he was telling – he was telling me he was going to bring me some money. He had got a check. He was supposed to be bringing me like $400, you know, from the check. And I said okay. And then another — he called again and he said he had shot someone.

Q Okay. Did he tell you who?

A He said it was a bum — somebody shot the — robbed him on the tracks. And I said, Robert, did you call the police and tell the police about it and he said, yeah. And so, I turned on the news, you know, thinking I'm going to see the – see it on the news, but I didn't see that. I saw three people had been shot.

Q Did you ask him about that?

A Uh-huh. He said he didn't know nothing about that.

Q Okay. He told you he shot a bum on the railroad track?

A He said somebody tried to rob him and he shot them.

Q Okay. Did he ask to come back to your house that evening?

A Yes, sir.

Q And what did you tell him?

A I told him, no, I didn't want to get involved with that.

Q Did y'all talk anymore about either the shooting he told you about or the shooting that you saw on the news?

A No, sir. He said he didn't have — he didn't know nothing about that.

Q Okay. The person that he told you he shot did he tell you where he shot him?

A In the head.

Q In the head. Did you ask — You said he told you the man was dead or did you ask him was he — did he die?

A I didn't ask. I just — I didn't want to get — I just didn't want to get involved in it. I told him he needed to contact the police about it.

Q He – he said what about the police?

A He said he had called the police and told – and told police about it.

Q Okay. Do you remember telling Detective — Detective Waites at the Bossier Police Department that you said, quote, "I said two people got shot and one was, uh, wounded —

A Yes, sir.

Q – was — was sent to the hospital?"

A Yes, sir.

Q And then he answered you with, "Uh-huh."

A Uh-huh (affirmative).

Q And then you replied, quote, "And he got quiet then when I said that?

A Yes, sir.

Q Did you suspect that he was the person that killed the three people that you had seen on the news?

A I didn't suspect it until the next morning when I woke up. When the story, The Young and the Restless, was on I seen the news and his picture came on the news and I just — I lost it because I — I couldn't believe he did something like that.

Q Okay. Okay, thank you, Ms. Moore. They may have some questions for you.

THE COURT:

Mr. English.

MR. ENGLISH:

Just a minute, Your Honor.

MR. ENGLISH:

No further questions, your Honor.

THE COURT:

All right. Ms. Moore, you may step down. You're just not to discuss this case until this case is

Mr. MARVIN:

* * *

[DIRECT EXAMINATION OF CRAIG ROBERTS]

Q Okay.

Mr. MARVIN:

Continue on, please.

(PLAYING OF VIDEO CONTINUED)

(PLAYING OF VIDEO CONCLUDED)

Q Okay, now, at this point, Officer Roberts, your suspect there is in in custody, correct?

A That is correct.

Q Okay. Subsequent to this is when you searched the compartment of the eighteen-wheeler?

A Correct.

Q Okay. I'm going to show you what has been accepted into evidence as State's Exhibit 74 and ask you if you can identify that?

A Yes, I can.

Q And what is that?

A It's a .380 handgun that was found in the cab of the truck.

Q Okay. And that is the one you found?

A Yes, it is.

Q Was it loaded?

A Yes, sir, it was.

Q Was the safety on?

A No, sir, it was not.

Q So at the moment in time you found that gun if a person had put their hand on the trigger it would have gone off?

A That is correct.

Q Okay. Thank you. Officer Roberts, I'm going to show you

Q Okay. Seventy-seven, what is that?

A That is the license plate on the trailer of the truck.

Q Seventy-eight.

A This is the truck again from the front.

Q Seventy-nine? And I'm going to run through these fairly quickly.

A That is the open passenger side door of the cab of the truck.

Q Okay. And if you can, Officer Roberts, and when you touch that screen right there it will make a mark on all these – every screen. The jury has screens in front of them.

A Okay.

Q Tell us where you found the gun.

A The handgun –

Q Or show us where you found the gun.

A – was located right behind this seat right there.

Q Okay. Was it on the floor?

A Yes, sir, it was.

Q Was it in a holster or was it in a duffle bag or a sack or –

A It was laying on the floor in plain view. If you would actually step up a little closer than this you could see the gun laying right on the floor.

Q Okay. All right.

MR. MARVIN:

That was seventy-nine, right?

MADAM CLERK:

That was seventy-nine.

MR. MARVIN:

Yeah, okay.

Q Eighty.

A That is the sleeper area of the cab.

Q Eighty-two?

A That –

Q Okay. Now, did you take this photograph?

A Yes, sir, I did.

Q Okay. Did you take it before you moved that gun?

A Yes, sir, I did.

Q Okay. So what's propping that gun up?

A It's a twelve-pack of Mountain Dew.

Q Okay. And that's exactly how you found that gun?

A Exactly how I found it.

Q Okay. Eighty-three? Did you take that picture?

A I did not take that picture.

Q Okay. Eighty-four. Was this picture taken at another location?

A This picture was taken at the station after I seized the handgun out of the truck.

Q Okay. And is the safety -- I see the red dot. Can you circle that for the jury? Okay. And to a police officer what does it mean when a firearm has the red dot showing?

A It means the gun is ready to fire.

Q There's nothing else you have to do but pull the trigger?

A That's correct.

Q Okay. Eighty-five. That's just another view from the opposite direction?

A Correct.

Q Eighty-six. And what is that?

A That is the view of the same handgun with the ammunition removed from the barrel and the magazine.

chamber.

Q Okay. And you removed them?

A Yes, I did.

Q Okay. Eighty-seven. That's just a close-up showing the serial number of the gun?

A That's correct.

Q Eighty-eight? Where did you find that?

A I found that in the wallet removed from Mr. McCoy.

Q Okay. Was it on his person?

A Yes, it was.

Q Eighty-nine?

A That is a birth certificate that was in the wallet.

Q Ninety?

A That is a copy of a pay stub that was also in the wallet.

MR. MARVIN:

Can you zoom in on the payee? Okay.

Q And so, Officer Roberts, if you were looking for Robert McCoy this confirmed that you found the right guy, correct?

A Yes.

Q Ninety-one?

A It appears to be an insurance card to a Robert McCoy also found in the wallet.

Q Ninety-two?

A That is a respirator fit test card to a Robert McCoy also found in the wallet.

Q Ninety-three?

A It's a VISA card to a Robert L. McCoy, II, also found in the wallet.

Q Ninety-four?

A It's a Social Security card to a Robert Leroy McCoy, II, also found in the wallet.

Q Ninety-five?

* * *

CROSS-EXAMINATION [OF CRAIG ROBERTS]

BY MR. ENGLISH:

Q Good evening, Officer.

A Good evening, sir.

Q My name is Larry English. I represent Mr. Robert McCoy in this case. How are you handling this heat?

A It was kind of a shock when I arrived.

Q It's pretty – I've got a secret for you. It's a shock for everybody in Louisiana too. But we shall get through it. I just – I just have a few questions for you. So you were there on the scene when Mr. McCoy was apprehended, correct?

A That is correct.

Q Did Mr. McCoy resist in any way?

A No, sir.

Q No threatening – no threatening, nothing, he just submitted?

A That's correct.

Q And the weapon was cocked and found behind the seat as you testified, correct?

A That's correct.

Q And Mr. McCoy – I mean was the weapon readily available for Mr. McCoy if he had wanted to get it?

A I believe so, yes.

Q Yes. And – and as to your knowledge he made no attempt –

A That's correct.

Q – to secure the weapon? Do you know an Officer Richard Smith?

A The name does not –

Q He works for the Idaho – Are you – are you – Is it Nez Perce County?

A Nez Perce County, correct. Lewiston is the county seat of Nez Perce County.

Q Okay. All right. And this is in beautiful Idaho?

A That's correct.

Q Okay. Do you fish?

A Yes, sir, I do.

Q All right. Mountain — mountain ski and do all of that?

A Yes, sir.

Q Okay. Great life, huh?

A Yes.

Q All right. Are you aware that on 5-12-08 Mr. McCoy was found in his jail cell hanging from a sheet where he had tried to commit suicide?

A I am aware of that, yes.

Q Were you there personally?

A No, sir, I was not.

Q But you were told about it?

A That's correct.

Q And that was a part of the — the sheriff's department reports?

A That's correct.

Q And I believe he was — Do you know an Officer Daniel Levitt?

A Yes, I do.

Q And Officer Daniel Levitt put in his report that EMS was called and Mr. McCoy was rushed to St. Joseph Regional Medical Center?

A If that's what he put in his report. I —

Q Is that — is that in Idaho?

A Yes.

Q Okay. All right.

A St. Joseph Medical Center is in Lewiston.

Q Okay. And he was found unconscious in the jail cell according to the officer's report, was that what you heard?

A I just heard that he tried to hang himself and he was transported to the hospital.

Q And you have no reason to doubt that if the officers put in their report that he was unconscious, correct?

A I have no reason to doubt that, no.

Q Okay. And are you aware that when Mr. McCoy was brought back to the county jail he was placed on suicide watch? Are you aware of that?

A No, sir, I'm not.

Q Okay.

MR. ENGLISH:

Your Honor, I have just —

Q Mr. McCoy wanted me to ask you a few questions. How long have you been a Lewiston police officer?

A Eleven years.

Q In your line of duty have you ever come across a case like this?

A Not a triple homicide, but I have worked homicides before.

Q Okay. So there — in your report you stated that you — it's been — the evidence is and testimony is that you retrieved a .380 firearm out of the truck?

A That's correct.

Q Did the — did the Lewiston Police Department take any fingerprints?

A Not to my knowledge, no.

Q There were two people in the car — in the truck, correct? There was the driver and Mr. McCoy?

A That's correct.

Q What evidence do you have that the weapon didn't belong to the truck driver?

A I briefly interviewed him at the scene and he denied any knowledge of the gun.

Q Again, you never — you never saw Mr. McCoy with the weapon, you just simply pulled it from the back of the vehicle, correct? From the back seat of the vehicle, correct?

A That's correct.

Q Okay. And you've already — and you just testified that the other individual in the truck stated that he didn't have the weapon?

A The driver did not have the weapon.

Q The driver did not have a weapon. And he did not — that was not his weapon that was retrieved from the vehicle?

A That's what he told us.

Q And this weapon was subsequently sent to Bossier Parish, correct?

A That is correct.

Q And that's the weapon that you just testified about right there?

A Yes.

Q Okay. Why — why — why did you only arrest Mr. McCoy and not the truck driver seeing that the truck driver was in the weapon with a truck — the weapon was in the truck driver's truck?

A Because the weapon was underneath or behind the passenger seat and not the driver seat.

Q Mr. McCoy wants me to ask you that if you did not retrieve the weapon from — from him — if you did not retrieve the weapon from him why did you enter it into evidence as being belonging to him?

A Because the information we received from the state police was that he was — that Mr. McCoy was possibly in possession of a .380 handgun.

Q I mean I'm going to ask you this question. I don't know whether or not you can answer it. On 5-13-08 a magistrate at the Lewiston Courthouse dismissed all potential misdemeanor charges against Mr. McCoy. Knowing that then, why on 5-14-08 did you and other Lewiston police — law enforcement people send dismissed evidence down to Louisiana to prosecute Mr. McCoy? Can you answer that question?

A No, sir, I cannot.

Q All right. I'm almost through, but I need to ask you this question, okay, Officer?

A Uh-huh.

Q Are you familiar with gun ranges?

A With gun ranges?

Q Yes. Where you practice at?

A Yes, sir, I am.

Q If one goes and takes a firearm to a gun range and fire it and retrieve the projectile and the casing will the elements match the gun? Can you answer that question?

A No, I cannot.

Q Okay. Did you place the gun in the truck and turn it — turn around and pretend that Mr. McCoy had the weapon?

A No, I did not.

Q Did you and your fellow officers beat Mr. McCoy and accuse him of committing suicide?

A No, we did not.

Q And you stated that you did not see Mr. McCoy's suicide attempt, correct?

A That's correct. I did not see it.

Q Thank you and I hope you stay cool, okay.

THE COURT:

Any redirect, Mr. Marvin?

MR. MARVIN:

No redirect, Your Honor, and the State rests its case.

(STATE RESTS)

All right, sir, you are excused at this time. Just do not discuss this case until the termination of this trial, please.

MR. ROBERTS:

Yes, sir. When you say excused, free to go?

THE COURT:

Free to go back to Idaho where it's cool, sir.

MR. ROBERTS:

Thank you, sir.

THE COURT:

Yes, sir. All right. Ladies and gentlemen of the jury, I'm going to break at this point. It is ten till five in the afternoon. We will start back in the morning and we'll start at nine o'clock in the morning. I am instructing you that you are under sequestration at this time. You're not to discuss this case with anyone. You're not to discuss this case around anyone. You're not to even talk to each other about this case. I hope that you have a good night. I hope that you have a good meal and get some rest. And we'll see you at nine o'clock in the morning. All rise for the jury.

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED OUT OF COURTROOM)

THE COURT:

The hallway's clear?

MR. SHERIFF:

Yes, sir.

THE COURT:

Mr. Marvin, is there anything I need to take up outside the presence of the jury, sir?

MR. MARVIN:

No, sir. We have — I guess this is your final jury charge.

THE COURT:

Mr. Marvin, could I get you next to a microphone, please, sir.

MR. MARVIN:

Is this the final jury charge that you —

MR. MARVIN:

Yes, sir, that's the proposed final jury charge. Yes, sir.

MR. MARVIN:

Okay. I got it. I'll look at it tonight.

THE COURT:

Mr. English, you do have that jury charge?

MR. ENGLISH:

I've got it in my hand, Your Honor.

THE COURT:

All right. Then we will meet tomorrow if we need to. Anything else, Mr. Marvin?

MR. MARVIN:

No, sir.

THE COURT:

Mr. English?

MR. ENGLISH:

No, Your Honor.

THE COURT:

Then Court will stand adjourned.

(COURT ADJOURNED)

* * *

EXCERPTS OF AUGUST 4, 2011 TRANSCRIPT RE GUILT PHASE OF TRIAL

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THURSDAY, AUGUST 4, 2011

(COURT CONVENES)

THE COURT:

Good morning.

MR. MARVIN:

Good morning, Your Honor.

THE COURT:

All right, Mr. Marvin, you had rested as of yesterday afternoon, is that correct, sir?

MR. MARVIN:

We did, Your Honor.

THE COURT:

All right. Mr. English?

MR. ENGLISH:

Yes, Your Honor.

THE COURT:

Are you ready to proceed, sir?

MR. ENGLISH:

Yes, Your Honor.

THE COURT:

And I will note for the record that Mr. McCoy is present with you in the courtroom. Is that correct, sir?

MR. ENGLISH:

That's correct, Your Honor. I have spoken to Mr. McCoy, Your Honor, and Mr. McCoy wishes to testify on his behalf. I have advised Mr. McCoy of his rights and I have advised him that he does not have the right to testify —he cannot be compelled to testify and that if he does not testify — testify the jury is not to hold that against him. I have advised him that if he does testify he is not to perjure himself; that he could be subsequently indicted for perjury. And I have advised him that if he does indeed choose to testify today that the District Attorney's Office, Mr. Schuyler Marvin, who is seating here does have the right to cross-examine him and will most likely do that.

THE COURT:

All right. Mr. McCoy, you were — have been in the courtroom the entire proceedings and you have heard all the evidence. Do you understand — And I'm just going to ask you these questions. Do you understand what Mr. English has told you? Is that correct? And be sure that microphone is in front of you, please, sir.

MR. McCOY:

Yes, Your Honor.

THE COURT:

All right.

MR. McCOY:

Yes, Your Honor, I do.

THE COURT:

All right. And I have advised you on numerous occasions that you have the right to remain silent in these proceedings; that you cannot be forced to testify in any way; and that you cannot be compelled to testify; and that you have the right to remain silent. And you understood that, is that correct, sir?

MR. McCOY:

Yes, Your Honor, I do.

THE COURT:

All right. You understand that anything that you say can and will be used against you possibly in this court if it is not favorable to your position? Do you understand that?

MR. McCOY:

Yes, Your Honor.

THE COURT:

All right. And you have discussed this with Mr. English, is that correct?

MR. McCOY:

Yes, Your Honor.

THE COURT:

All right. And you understand that if you take the stand that you are only to answer the questions asked to you and that you can be held for perjury if it's determined that you do not tell the truth? Do you understand that?

MR. McCOY:

Yes, Your Honor.

THE COURT:

And you're doing this freely and voluntarily, is that correct?

MR. McCOY:

Yes, Your Honor.

THE COURT:

All right. Then I have questioned you and you understand that you are not compelled to testify and that none of this can be — if you do not testify that nothing can be held against you? Do you understand that?

MR. McCOY:

Yes, Your Honor.

THE COURT:

All right. Then, Mr. McCoy, I will call back in the jury. And we are ready to proceed, Mr. English?

MR. ENGLISH:

We're ready to proceed, Your Honor.

THE COURT:

All right. All rise for the jury, please.

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED INTO COURTROOM)

MR. SHERIFF:

All jurors are present, Your Honor.

THE COURT:

You may be seated. Good morning, ladies and gentlemen. I hope that you had a good nights' rest and we

are starting with our trial again this morning. The State rested as of yesterday afternoon and now I will recognize Mr. English for his case.

MR. ENGLISH:

Your Honor, at this time we would like to call Mr. Robert McCoy to the stand.

THE COURT:

Mr. McCoy, if you'll come forward, face the clerk and be sworn, please, sir.

(DEFENDANT SWORN BY THE CLERK)

THE COURT:

You may proceed, Mr. English.

MR. ENGLISH:

Yes, Your Honor, just a second. Let me cut my cell phone off, Your Honor, just to make sure. I don't think I cut my cell phone off. I don't want it to —

THE COURT:

Mr. English, that would not be good.

MR. ENGLISH:

Then you take my cell phone and that would just be bad.

THE COURT:

I may take you.

MR. ENGLISH:

And that would just be bad, Judge.

THE COURT:

Yes, sir.

ROBERT LEROY MCCOY, II

CALLED AS A WITNESS

BY COUNSEL FOR THE DEFENDANT,

WHO, AFTER HAVING BEEN DULY SWORN,

WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MR. ENGLISH:

Q Good morning, Mr. McCoy.

A Good morning, sir.

Q State your full name for the record.

A My name is Robert McCoy, II.

Q And where do you live?

A Well, now I currently reside at Bossier Max, but —

Q Before Bossier Max?

A Off of — 5705 East Texas Street.

Q Okay. I want to ask you something about yourself, Robert. Okay?

A Yes, sir.

Q Where were you born at?

A Shreveport, Louisiana.

Q In what year and how old are you?

A I'm thirty-seven,

Q And tell me about your parents. Who's your mother?

A My mother is Mary McCoy and my father is Robert McCoy, Sr.

Q And your mother was sitting in court for a couple of days, correct?

A Yes, it is.

Q Do you know why your mother has not — and your father has not been in court the last couple of days?

A Well, they're not here today because my mom has decongested (sic) heart failure and some of the pictures that was vindicated on the screen she can't take.

Q And so your mother has not been here because of health reasons where she simply — it is not in her best interest physically for her to be subjected to a lot of stress, correct?

A That's correct.

Q And how many siblings do you have?

A Four.

Q And where do you rank — where do you rank in that? Are you the oldest, the youngest, the middle child, or as we call it in Cotton Valley the knee baby?

A No, I'm the —

Q Where are you at?

A I'm the second oldest.

Q Okay.

A If you — if you're speaking of children from my mom there's five of us.

Q Five of y'all?

A Yes.

Q Okay. And where did you grow up at? Which neighborhood?

A In Eden Garden.

Q In Eden Garden. And what does your father do?

A My father is, as we say, a constructioner.

Q Does construction work?

A Yes, sir.

Q And your mother?

A She don't do anything right now because of her health conditions.

Q Okay. When you were growing up — when you were growing up did both of your parents work or did your mother stay home?

A No, they both worked.

Q And where did your mother work at?

A My mom did home health.

Q Okay. And your father was doing construction?

A That's correct.

Q And where did you go to elementary school at?

A Eden Garden.

Q Eden Garden Elementary. Do you remember your childhood, your early days?

A Yes, I do.

Q How would you describe them?

A It was fair.

Q When you say fair, what do you mean?

A Well, I really didn't have anything to, as I would say, want for because as long as I had my mom and dad I had everything.

Q Okay. You — you're grown now and you — you have an understanding. Would you say — were your parents — economically were your parents, for lack of a better word, did you grow up -were they — financially were they poor, working class, middle class? How do you think of — how would you rate your childhood economically?

A I would say they were working class. But, you know, like everybody struggled to go through periodical processes, but I would say working class.

Q There was always food on the table?

A Yes, it was.

Q Always a roof over your head?

A Yes, it was.

Q How would you describe your — And where did you go — where did you go to junior high school?

A Ridgewood Middle.

Q Ridgewood Middle School?

A Yes, sir.

Q What year was this? Do you remember?

A From I think '84 — no, '85 to '88.

Q And how was that?

A It was well. I participated in a lot of sports and —

Q That's — tell me — tell me what you participated in?

A Track and field and football.

Q What did you run?

A I ran the four-man — Well, hundred mile, four hundred mile relay and some with triathlon.

Q Triathlon is — Help me out. Triathlon is where you do a whole lot of different events, correct?

A Well, no, it's when you run around the track probably about twelve to fourteen times to be the first competitor on a time consuming scale.

Q Okay. And you played football?

A Yes, I did.

Q And what position did you play?

A Running back and cornerback.

Q Well, here's the question. Were you any good?

A Very good.

Q And where did you go to — Did you — did you receive any athletic honors?

A Yes, I did. I received several — well, several honors. I received two MVPs in football, one in track and field, and then honor scholarships for excellent achievement in educational proceedings.

Q Okay. So how did you do academically in junior high school

A I did well.

Q What's well? I mean I was a lousy "C" student. So, what's well?

A "B" and above.

Q Okay. All right.

MR. MARVIN:

Your Honor?

THE COURT:

Yes, sir.

MR. MARVIN:

At some stage in this trial that type of evidence might be relevant, but as to this we're only here to determine if he's guilty, guilty of a lesser crime or not guilty. A little bit of background is fine, but —

MR. ENGLISH:

I'll move — I'll move on, Your Honor. I'll — I'll — I'll just ask the Court to indulge me just a few more minutes and then I'll move on.

Q Okay. And where did you go to high school?

A C. E. — C. E. Byrd High School, sir.

Q Oh, you played football and track there?

A Well, I played football there.

Q Football. Running back?

A Yes, sir.

Q And how did you do?

A In the newspaper every week, player of the week.

Q Okay. And since —

THE COURT:

All right, Mr. English, I'm going to —

MR. ENGLISH:

Okay, that's fine, Your Honor.

THE COURT:

— sustain that objection at this time.

MR. ENGLISH:

I'll — I'll move on, Your Honor.

Q Mr. McCoy, let's talk about the evidence that the State has presented here today. Can we do that?

A Yes, we can.

Q You heard Officer Humphrey testify that a warrant was issued for you for aggravated battery on Yolanda Colston. Did you hear that?

A Yes, I did.

Q Did you commit aggravated battery —

A No, sir.

Q — on Mr. Colston?

A No, sir.

Q You didn't?

A No, sir.

Q On Ms. Colstson, I'm sorry. Now, let's try to do this chronologically. You heard Sharon Moore's testimony yesterday, correct?

A Yes, I did, sir.

Q Sharon Moore testified that you asked her to — for money to buy bullets. And your testimony is what?

A Why would I ask her for money to buy bullets when I don't own a gun? Why would I ask her for money to buy bullets when I have no intentions on doing anything? I — I have a job. I have money. I make twenty-three — I mean I make $2200 every two weeks.

Q And so, it is your testimony that you never asked her to do that?

A I never asked Sharon for any money. I virtually speak with Sharon on occasion. Sharon is a nice girl. Sharon is controlling. But as far as me asking Sharon for money for bullets and stuff, that is a concocted story just like they've vindicated Mr. Houston to make stories. The District Attorney's Office is very powerful when it come to dictating peoples' moves — dictating peoples' moves.

Q Well, I want to talk with you about that for a second. But let me ask you this. Ms. Moore indicated that you and her were having a relationship, is that true?

A I was in a relationship with Ms. Moore prior to my advancements with my wife. When I got very serious with my to-be wife, me and Ms. Moore had no more dealings together.

Q Ms. Moore's testimony was that you spent the night with her the night before the alleged — the murders took place. And are you denying that?

A Most definitely. There —

Q And you're denying Ms. Moore's testifying that you never asked her to buy bullets?

A Most definitely.

Q Okay. Well, let's stay on Ms. Moore.

A Yes, sir.

Q Ms. Moore then testifies that you called her the next day and told her that you — well, Ms. Moore indicated that you wanted to purchase the bullets because you were working for the railroad and you were going in a dangerous area. Did you tell Ms. Moore that?

A No, sir. The railroad does not require firearms on any of their machinery. They does not require firearms

on any property aspects of theirs. They have federal authorities that vindicates everything for them. I have never told Ms. Moore no such thing.

Q And Ms. Moore testified that you called her the next day and told her that you had shot somebody. You heard that testimony yesterday?

A I sure did.

Q Is that true?

A No, sir.

Q You never called Ms. Moore, Mr. McCoy?

A I called Ms. Moore after she left several messages on my machine telling me that her little boy that she calls "Stink", he's a real nice little baby, had got ran over by a car. Her sister backed over the baby. And we corresponded from that point. But as far as me telling —

Q Wait, tell me what — what day and time did Ms. Moore call you and tell you that her child had gotten run over?

A I would say —

Q Was this — was this on — was this on the — was this — did this take place on May the 7th — I'm sorry, on May the 4th, 2008, or May the 7th, 2008?

A No. Ms. Moore had initially started calling me from the 4th until I just broke conversation with her probably on the 8th or the 9th.

Q Okay. So — so let me ask you this question. You indicated that you and Ms. Moore had a relationship but you cut that relationship off once you and your wife got serious. Why was Ms. Moore still calling you?

A I mean that's Ms. Moore's prerogative. I mean I can't tell her to stop calling me, you know, if — you know, I'm a friend. Friends talk to friends.

Q Okay. And Ms. Moore's testimony that you called her and told her that you had shot a bum is not true?

A No, sir.

Q It's not true?

A No, sir.

Q And Ms. Moore indicated that she checked her television and saw that two people had been shot and one taken to the hospital and the next time she called you, you told her — she asked you whether or not you were involved in that and you said you weren't; you said that you had only shot a bum who had tried to attack you.

A I have never —

Q Did you hear that testimony?

A Yes, sir. I have never had such conversation with Ms. Moore about anything like that.

Q And — and Ms. Moore indicated she asked you where did you shoot the individual and her testimony was you said in the head. Do you remember?

A I — I have had no such conversation with Ms, Moore about that.

Q Can you tell the jury why Ms. Sharon Moore would come into this courtroom under oath and lie?

A The same aspects that Mr. Gary Houston did. When you —

Q I'm sorry?

A The aspects in which Mr. Gary Houston did. When you get involved with circumstances and situations and

you put yourself in the aspects of wanting to be a part of a lot of things like everybody has been throughout this whole proceeding — people have vindicated that I was knocking on the window at their house at six o'clock in the morning when I was never in the state. People have vindicated that they seen me going from place to place in Shreveport —

Q Robert, let me — Robert, let me ask you — Robert, let me ask, please, stay on the question that I'm asking.

A I am.

Q The question that I'm asking you is why do you believe Ms. Moore came into this courtroom yesterday and under oath and made those statements against you?

A Well, the thing is you seen Ms. Moore did not want to come here. Ms. Moore vindicated and, if I'm not mistaken, the defense — counsel, Mr. Schuyler Marvin vindicated that she did not want to be here today.

Q So why do you think she came?

A Because she was forced to come.

Q And why was she — who — who forced her to come here?

A The district attorney's office.

Q And — and what did the district attorney do to force her to come here?

A If you make a statement on any aspects — That's how they have formally indicted me. You don't have to have much information to indict a person. An indictment is a formal written warning that's accusing a person of a crime, but when you go past the aspects to tell any judicial official that you know about anything

they're going to hold you accountable for what you said to them.

Q So, let's — let's stop there. Ms. Moore gave — was contacted — Do you know why Ms. Moore was contacted by the Bossier Parish Police Department?

A I haven't the slightest idea.

Q If I told you that the State has evidence that phone numbers from a cell phone that they alleged you had where calls were being made to Ms. Moore back and forward and that's how they — why they contacted Ms. Moore, what's your — what's your answer to that?

A It's a good possibility that I had. It's a good possibility that I didn't, because my associate, Robert Evans, that drove trucks, he had it as well.

Q Robert Evans had your cell phone?

A Yes, sir.

Q And so you're saying that Robert Evans was — Let's go specifically on –

A That's right.

Q — the date of 5-9-2008, the next day after the murders took place. The DA will probably have cell phone records that's going to say you were making calls — somebody — they — somebody owning a cell phone that you had in your possession –

A Uh-huh.

Q — was making phone calls to Ms. Sharon Moore. Who was —On the — on the 9th of May, 2008 —

A On the 9th —

Q — were you making phone calls to Ms. Moore — to Ms. Moore on that date?

A On the 9th of two 2008 in May?

Q The day — the next day after the murders the cell phone records show that a cell phone that allegedly belonged to you was making calls to Ms. Moore. Were you the person doing that?

A No. Mr. Evans was calling the numbers back that was on the phone because he was in possession of the phone. He — You know, I had another phone because Detective Humphrey was steady threatening me and calling me, so I went and bought me a pre-paid phone.

Q So I want to talk — So Detective Humphrey was threatening you. I want to talk about that. Hold on.

A Yes, sir.

Q So — So I want to be clear. You never called Ms. Moore on five — on the day after the murders?

A No, sir.

Q And if the phone — if phone call — if the phone records from a phone that you allegedly own showed that you were making calls going backwards and forwards that wasn't you?

A No, sir.

Q And who do you think was making those calls?

A I just quoted on the record, Mr. Robert Evans was.

Q Who's Mr. Robert Evans?

A Mr. Robert Evans is a Continental Truck driver that I know from Cedar Grove. He's a good friend of mine.

Q And why did Mr. Robert Evans have that cell phone?

A I let him use it.

Q And why did you let him use it?

A Because his wife turned his off.

Q Because his wife turned his off?

A Yes, sir.

Q So, Mr. Robert Evans — Do you know why he was calling Ms. Sharon Moore?

A I mean he was calling everybody back home for me. I told him I didn't have no dealings with Sharon. I told him you can talk to her.

Q No, I'm asking you — I'm asking you specifically, Robert, do you know why Robert Evans, your friend, was calling Sharon Moore the day after the murders?

A No. No, I cannot answer that.

Q Did your — did Mr. Robert Evans know Ms. Sharon Moore?

A We spoke of her and I told him I don't deal with her, so you can talk to her. And she didn't think highly of that when I offered her to someone else.

Q So you offered — so you broke off with Ms. Sharon Moore and you offered her to your friend?

A Yes, sir.

Q And he was calling her that day? The day after the murders he was calling her?

A Well, I didn't have the cell phone to —

Q Okay.

A — specifically say that he was calling her —

Q Okay.

A — but I know he had the phone and on occasions he told me he talked with her.

Q Okay. Do you know why Ms. Moore gave a statement to the police immediately after the murders took place reciting everything that she testified to? Do you know why Ms. Moore told the police that information? Why she lied on you? Because you're saying she lied on you, correct?

A Yeah. Ms. Moore is very upset with me, sir.

Q Why is she upset with you?

A Because she tell me basically that I made a fool out of her.

Q Can you explain?

A Yes, sir. Ms. Moore was very infatuated with me. Me and Ms. Moore, we went places together, did things together. Her kids, they loved me. And when I broke it off with Ms. Moore — Ms. Moore always had a man staying with her, her kids' father. Ms. Moore was playing two sides of the fence at the aspects of our socializationship. And it came to a point that if someone don't be the bigger person here, something is not going to work out right. So I told Ms. Moore it was fun while it lasted, but I'm not going to do this anymore. I have a conscience.

Q So Ms. Moore testified — Ms. Moore told the police that you admitted to killing someone because she was scorned and you broke off the relationship?

A Yes.

Q Is that the reason why?

A I would believe so.

Q Now, you indicated that Detective Humphrey was making threats to you during this time —

A Yes, sir.

Q — correct?

A Yes, sir.

Q What do you mean?

A I mean plain and simple Detective Humphrey threatened me. Detective Humphrey told me he was going to kill me because I exposed Mr. Richard McGee. I exposed Mr. Joshua Bounds. And I got involved in a situation that I never should have got involved in. I exposed Mr. Robert Thomas.

Q Let's talk about it. All right. Okay. Detective Humphrey told you he was going to kill you because you exposed Mr. Richard McGee — I want to write these names down — right?

A Yes, sir.

Q And who else did you expose?

A Joshua Bounds.

Q Joshua Bounds?

A Yes, sir. He worked —

Q And who else did you expose?

A Mr. Robert Thomas. He used to be an ex-sheriff's deputy. He owns White Automotives right off Barksdale. And all these people that I've mentioned are very strongly in drugs.

Q Okay. All right. So what does Mr. Richard McGee do?

A He's a pastor and he's a Bossier City policeman.

Q He's with the Bossier City Police Department. What specifically did you do to expose Mr. Richard McGee to Officer Humphrey that he wanted to get you and kill you? What did you do?

A Well, when me and Mr. Humphrey first crossed paths, I was trying to tell Mr. Humphrey about Mr. McGee thinking that I was doing the right thing because detectives are in a vindicative line before everybody else, not knowing that I was talking to somebody that was right along with them.

Q So what — what — tell — let me ask you specifically. Are you saying that Mr. —a police officer from the Bossier Parish Police, Mr. Richard McGee, was engaged in criminal conduct?

A Yes, sir.

Q What criminal conduct was he engaged in?

A He was selling drugs to numerous individuals. Mr. Richard McGee has been incarcerated for carnal knowledge of a juvenile. He got four and five — yes, sir — individuals pregnant that are young adults or what is it — What is this gentleman's name? Wayne Womack — And Mr. Humphrey is very familiar with him —that's at the Max now.

Q Okay. Let's — let's talk about Richard McGee.

A Okay.

Q And so you're saying Officer Humphrey, this man sitting in the courtroom, had knowledge that the Bossier Parish police officer, Richard McGee, was selling drugs?

A Mr. Humphrey and all of them have knowledge of everything that's going on. Even Chief Halphen had knowledge of everything that was going on.

Q All right, let me stop you. You're saying that Officer Humphrey is engaged in a cover-up with Richard McGee to sell drugs? Is that what you're saying?

A Mr. English, all of them are involved in the cover-up. They watch — they watch one another's back, Mr. English. They're not going to give up on their own, Mr. English.

Q Mr. — Who is Mr. Joshua Bounds?

A Joshua Bounds is another policeman that works for them. He works in the Narcotics Division.

Q And is Mr. Joshua Bounds also selling narcotics?

A He's involved.

Q He's involved?

A Yes, sir.

Q Along with Richard McGee and Detective — and Officer Humphrey here?

A Officer Humphrey has foreplayed knowledge of everything that was going on. Office Humphrey was the one that called my phone, told me that he was going to say everything bad about me on the news. Officer Humphrey — I'm not going to stricken it on the word — called me every cuss word but a child of God. Officer Humphrey told me he was going to do everything he could to get me. Officer Humphrey was the reason why I went out of state on the twenty — 21st of April. That was the reason why I went out of state after Richard McGee and Joshua Bounds came into my house off Texas Street, hit me in the face with his weapon, beat me up and took $1200 —

Q Okay, let me stop you —

A — from me.

Q Let me stop you. So you're saying Officer Humphrey chased you out of the State of Louisiana?

A Yes, sir.

Q And Officer Humphrey wanted — wanted to do harm to you?

A Yes, sir.

Q And you're saying Officer Humphrey was involved in covering up drugs that Bossier Parish police officers are involved in?

A Yes, sir.

Q I'm going to — Let me ask you. Can you tell me briefly how do you know that these individuals were involved in selling drugs?

A How do I know?

Q Yeah.

A I've seen it. I've been with individuals that they support and give drugs to.

Q So the Bossier Parish police are selling drugs in this community is what you're saying?

A Yes, sir. They're as corrupt —

Q All right.

A —as you ever want to see them.

Q All right. Okay. Now, the District Attorney yesterday played a 911 tape of Ms. Christine Colston.

A Yes, sir, I heard it.

Q You heard it. And on that tape Ms. Colston in harrowing, chilling — is begging, Robert, Robert, she's not back there. She's not back there.

A Yes, sir.

Q Was that you?

A No, sir. That was Mr. Robert Thomas. Mr. Willie Young was a trans —

Q Okay. All right, let — you say that was Mr. Robert Thomas?

A Yes, sir.

Q Now who is Robert Thomas?

A Robert Thomas is the drug-dealing cop that I was speaking about that owns White Automotive right off Barksdale.

Q And Robert Thomas — Why was Robert Thomas in the house and why did you believe Robert Thomas committed these crimes?

A Mr. Thomas was also involved with my brother. My brother and Mr. Young transported dope in cars for them coming back. And I went with Mr. Young to White's Automotive and Mr. Young had something in a bag. I didn't know what it was until I went to —I tried to tell —

Q So let me — No, no. I'm asking you a question, Robert. Why are you saying Robert Thomas and not Robert McCoy was the person in that house and killed those people?

A Willie Young told me he owed Mr. Thomas $2500 and asked me for it because he said an individual ran off with his dope and money. And I told him I was not going to help him contribute to no assets like that. If he needed food, if he needed aspects for shelter I would help him. He gets a check. And I want to bring this to your recollection. On this — on this day — They get

checks on the first, third and fifth. It's no coincidence that Mr. Young and my family perished on the 5th. That was a day when he supposedly got some money. They know it. It's a regular routine. It's a regular routine.

Q Who knows that? Detective Humphrey knows that?

A No. The people that he deals with.

Q Okay. And — and —

A And by the way Mr. Young is my cousin.

Q And so — and so — and so you are saying Mr. Robert Thomas committed these murders because this was essentially about drug money is what you're saying?

A It was a drug deal gone bad. They spoke it on the news when it first happened. Then all of a sudden I became the main suspect because McGee and Bounds when they beat me up in my house took the car — took the car. It didn't have no plates or nothing on it. It was sitting in the back part of the apartment. They took the car.

Q All right. Let's — let's talk about the car. The State showed video tape of a white vehicle speeding away from the crime scene. Do you admit that that was your car?

A I admit that that is the car that me and my wife had occupied, yes, sir.

Q Okay. All right. Okay. And the video, which was quite dramatic, shows the police chasing you. And the police officer says, he's going to bail. He's going to be — he's going to bail. He's going to bail. And quite clearly on the screen a black male hops out of that car and hops over the fence.

A Uh-huh.

Q Was that you?

A No, sir. And I want —

Q Who was that? Who was that, Robert?

A And I want to correct you. You said that he was chasing me. No, he wasn't chasing me.

Q I'm sorry. He was chasing the vehicle and a black male hopped out of the vehicle and jumps over the fence. That was not you?

A No, sir. No, sir.

Q Who was it, Robert?

A You're asking me to speculate and I can't do that. I know I was in — wasn't in possession of the car.

Q Okay, Robert, who had possession of your car?

A Mr. McGee and them took it from me, so I can't tell you — I don't have —

Q When did Mr. McGee and them take your car from you?

A Sir?

Q When did they take your car?

A They took my car on the 18th.

Q Of what, April?

A No. The 18th of — Yeah, the 18th of April of 2008.

Q They took your car?

A Yes, they did.

Q Tell me — tell me how did they take your car? Now who is —Now tell me who is Richard McGee again?

A Richard McGee is a cop that works for the Bossier City Police Department.

Q So the Bossier City Police Department police officer who sells drugs –

A Yes.

Q — took your car?

A Yes.

Q Why would he take your car, Robert?

A Why wouldn't he? Why wouldn't he?

Q No, I'm asking you — I'm asking you — I'm asking you — I'm asking you, please explain why would he take your car?

A Well, Mr. McGee and them's whole aspect was to kill me. I have neighbors on both sides of me and due to the fact that they couldn't accomplish their aspects of their missions they told me I was going to wish I was dead.

Q Because you were going to expose them?

A No, I already did. I'm telling you —

Q You had — you had —

A — I talked to Mr. Humphrey there.

Q Because you exposed them — about them selling drugs?

A Yeah, and I didn't know Mr. Humphrey was right along with them.

Q And so they took your car, right? You're saying they came into your house and took your car?

A No. I'm telling you they came into my house and took my car.

Q No, I understand. I understand. And so the car that was being driven at the crime scene wasn't your car? I mean was your car but you don't know who was driving it?

A No, sir.

Q So, Robert, it appears —

A Uh-huh.

Q — that the individual who jumped out of that car and hopped over the fence had the same build and body type as you.

A Mr. —

Q Do you see that?

A Yes, sir. Mr. McGee's got the same build and body type I do — I do too.

Q So it's a possibility it could be Mr. McGee that was driving that car?

A Yes, sir. I'm not going to speculate, but they know Mr. McGee's got the same build as I do too.

Q Okay. But it wasn't you?

A No, sir.

Q All right. Let me — let me — let me go back because I — I want to try to keep this — Before all of this took place, the District Attorney showed a video tape that he alleges, and I believe that Officer Humphrey said, was you purchasing bullets from Wal-Mart.

A Mr. Humphrey will tell you anything to try and tie me into something. State versus Tilley vindicates that the description of a suspect has to be sufficient and in detail. You can't speculate and say this is someone. You have to know that that is someone. There are a lot

of people on death row right now because someone speculated because that is someone. You have to be specific. You have to know if that's Robert McCoy, that's Robert McCoy; if that's McGee, that's McGee.

Q Would you acknowledge, Robert, that the person on that video had your same body type and physical resemblance; that that individual physically resembled you? Would you admit that?

A I'm not a body watcher, sir, and I'm not going to —

Q Okay. Okay.

A — vindicate that.

Q Well, that's — that's — that's fair. I think you recall that the individual on that video tape had a do-rag on?

A Yeah.

Q Right?

A Yeah.

Q What's a — what's a do-rag?

A do-rag is a cloth thing that you wear on your head to support your so-called —

Q Your hair?

A — wave formation on your head. It's a $3.00 aspect and everybody wears them.

Q And it's there to — When you say wave, black men like to wave their hair?

A Yeah, like the little foundation of your hair —

Q Yeah.

A — it has wavy aspects to it.

Q And so you wear a do-rag, correct?

A Yes, sir.

Q And that individual had a do-rag on, correct?

A Yes, sir.

Q Okay. But it's your testimony that was not you?

A My testimony is solemnly that was not me.

Q Okay. And Detective Humphrey who identified you is — that's just a part of his plot —

A That's exactly right.

Q — to do you in?

A Was Detective Humphrey there to see me purchase bullets? Was — was Detective Humphrey right there with the cashier to see me purchase? He wasn't. So Detective Humphrey can say anything he want to say right now, but if Detective Humphrey was really real about things he would tell y'all the truth about everything that's going on.

Q Okay. All right. And so, Robert, the testimony is then and the evidence then shows that according to the District Attorney you called your brother — Gayle Houston testified. You know Gayle Houston, correct?

A I know Gayle well.

Q And Gayle said — indicated that you and he were childhood friends, correct?

A Yes, we — yeah, we grew up together.

Q And it was apparent that Gayle didn't want to be in here testifying yesterday?

A That's exactly right.

Q Now, why do you think your childhood friend came in here and testified against you?

A Look at the powers that be.

Q Schuyler Marvin?

A Yes, sir. And then he also —

Q Are you saying — Are you —

A He also told you that when you cross-examined him further that they told him that they was going to tie him into it as an accessory to the fact. That — that's a threat.

Q So — so Schuyler Marvin —

A That's coercion.

Q Okay. I'm sorry. Go ahead on.

A That's a threat. That's coercion. You — they coerced him to — to the point that he couldn't make an intelligent decision on his own. That's the aspects of Mintzy (sic) versus Arizona. You can't coerce a person. You can't lead a person. You can't vindicate the aspects of your law to a person in which they — they're not able to make a probable decision.

Q And so Schuyler Marvin pressured Gayle Houston to come in here, correct?

A Yes, he did.

Q So let me ask this question. Gayle Houston gave a statement immediately after these murders took place and in that statement he indicated that you told them "I fucked up."

A No, sir.

Q You never told him that?

A Gayle Houston also told you that —

Q Let me just ask you, you never told –

A No, sir.

Q — Gayle Houston that?

A No, sir. No, sir.

Q Gayle Houston testified that you told him and his brother and your brother, Spartacus, that you had killed three people and you're not going to jail. You didn't tell him that?

A Mr. English, all this is hearsay.

Q No, I'm — Okay, I understand. But it's in the record now.

A This is hearsay. I understand it's in the record.

Q Okay.

A But you're questioning me about something I have no relevance to.

Q Well, well — But what I'm telling you, you heard Gayle Houston's testimony yesterday, right?

A I — I heard everything everybody said in here, Mr. English.

Q Okay. And so, do you know why Gayle Houston –

A I can't —

Q — he lied on you?

A Well, he had a purpose. He involved himself into something that he shouldn't have been involved in. Also, in the record it stated in his report that he didn't know about the incident until the day after. He — It also vindicated that he told a fellow employee. A fellow

employee vindicated that they called the policeman and that's how Mr. Houston got personally involved.

Q Okay. Well, let's — let's — let's focus — let's focus on — Mr. Gayle Houston gave a statement to the police. That's —and he stated that. That's in the record. And what he told the police, he's lying, correct?

A Most definitely.

Q Okay. And your reason for why Mr. Gayle Houston lied on you is that this man, Schuyler Marvin —

A And Mr. Griffith, the detective.

Q Wait a minute. The District Attorney. Who else?

A Mr. Griffith, Brian Griffith.

Q And Brian Griffith threatened him?

A These detectives in Bossier City that's all they do, threaten, lie and coerce.

Q Okay. And they forced Gayle Houston to testify against you?

A Yes, sir.

Q Okay. And when Gayle Houston testified that you were crying and upset, he's lying?

A That never happened. I never seen Gayle Houston.

Q And when Gayle Houston testified that you said I'm going to kill myself, I'm not going back to jail, he's lying?

A As you see, I love me. What am I going to kill myself for?

Q Okay.

A I love me.

Q All right. Now, the evidence then, according to the District Attorney, shows that you hitchhiked a ride in East Texas with a truck driver?

A That never happened.

Q That never happened?

A That was Robert Evans that I was with, the fellow truck driver that I told —

Q Okay.

A — you about. That's after I came back from California.

Q Okay. So on — on the day after the murders you never hitchhiked a ride with anybody?

A No. I wasn't in the State of Louisiana.

Q Okay. I want to — I want to — Okay, let's talk about that

A All right.

Q On — on — on the — on the — on the night of the murders

A Yes, sir.

Q — where were you at?

A In Houston, Texas.

Q You were in Houston, Texas?

A Yes, sir. I gave you the aspects of Ms. Sharon — with Ms. — What is — Her name's not Sharon. Sandra Black.

Q So —

A You — you read the letter and Sandra vindicated how could they put you there.

Q Okay.

A How could they even say you did it. I was with her and I told you some personal things to vindicate that I was with her.

Q All right. Okay. So you were in Houston, Texas?

A Yes.

Q Now, the DA's going to probably introduce some cell phone records from a phone that again he said belonged to you showing that you were making numerous calls and that the cell phone tower shows that those phone calls were being made in Bossier Parish –

A Okay.

Q — and Caddo Parish.

A Okay.

Q Can you explain whose cell phone was making phone calls on the — on the 8th of May, on the 9th of May, in Bossier and Caddo Parish?

A You asked

Q Let's — let's be specific. It will show on the night of the murders your cell phone, according to the district attorney —

A My sister's cell phone.

Q It was your — it was your sister's cell phone?

A Yes, sir.

Q And you didn't have possession of that cell phone?

A No, sir, not at that appropriate time.

Q And who had possession of that cell phone?

A Mr. Roberts Evans, sir.

Q Mr. Robert Evans had possession of it. And so, Robert Evans was calling all these people. It wasn't you? I'm just asking you. That's a straight question.

A The normal response, sir, when someone calls your phone you're going to call them back.

Q No, I'm asking — no, no, no. Robert Evans was using your cell phone?

A Yes, sir. Robert Evans —

Q And all those phone calls going backwards and forwards from that cell phone Robert Evans was making those phones — I mean Robert Evans was making those phone calls?

A He was in possession of the phone, sir.

Q Okay. Was Robert Evans in — He wasn't in Houston with you. He was here in —

A Robert Evans left Houston Sunday and came down here to get a tractor/trailer load and —

Q Okay.

A — came back. That's how I ended up getting in aspects of a eighteen-wheeler.

Q Okay. All right. So on — so let's just — let's just stay focused here. On the day after the murders the District Attorney's testimony is — I mean his evidence is — he's arguing you hitchhiked a ride in East Texas and there was some problems with that driver and at the — at the — at the state line of Idaho, at the weigh — the weigh station, you then got in another vehicle?

A Well, it didn't go according to that aspect.

Q Well — well, tell us.

A Well, when me and Mr. Robert Evans, we reached a truck stop in Texas. Mr. Robert Evans' gear shift messed up on his truck. And that was the truck that officially messed up. And then there was a man named Mr. Robert — Robert — Robert — Robert — Robert Dean, a fellow trucker of his, because I told Mr. Evans now you done got me out here. I'm not going to stay out here. I'm not used to doing this. So Mr. Dean is the fellow trucker that I got in with that he spoke with that was going to help me get back to up there with my brother because I was not coming back down here —

Q Okay.

A — after Mr. Humphrey and his whole crew was trying to kill me. I wasn't coming back. I was fleeing for my life.

Q So let me stop you.

A Yes, sir.

Q You were in those — Why didn't you like take the Greyhound bus?

A Well, I took the Greyhound bus when Mr. McGee and them tried to kill me and my brother took me down to the Greyhound station and I —

Q No, I'm asking you — I'm asking you — I'm asking you now on — on the day when you were riding with Mr. Evans why didn't you take a bus or an airplane or drive?

A Why would I? I mean that's my company. That's my friend. I wanted to —

Q Okay.

A — you know, assist him in anything that I could. I wanted to talk to him. I needed somebody to talk to.

Q All right. So you weren't fleeing from –

A No.

Q — you weren't fleeing from anybody, from these murders?

A No. No.

Q Right?

A No.

Q You didn't know that the murders had taken place?

A No.

Q All right.

A No.

Q So let's speed up. You get in the truck in Idaho, correct, at the — at the line? You transfer into another — with another individual?

A It's a lot of lines here, Mr. English.

Q Okay. Let me put it like this then. Let's speed up. The State has testified that at the weigh station you got in another truck and that truck proceeded through Idaho — Lewiston, Idaho.

A Swift Truck?

A Well, that was — that was Mr. Blanchard's truck.

Q Right.

A The only reason I got in the truck with Mr. Blanchard was because Mr. Dean, the individual that got stopped —

Q Okay.

A — because he was over his time limit and didn't have his sheets right. We was going to the next stop to

get something to eat and Mr. Blanchard vindicated, well, Mr. McCoy, since Mr. Dean is stopped, hey, I'm going that way.

Q Okay. And the District Attorney put up on the screen yesterday —

A Uh-huh.

Q — the video tape and you heard the officer from Idaho testify.

A I sure did, sir.

Q And the video tape was again quite dramatic. It shows the police pulling over the truck. It shows the police bringing you out of the vehicle –

A Uh-huh.

Q — and bringing you and placing you in front of the police vehicle. You remember that, right?

A Placing me on the side of the police vehicle?

Q On the side of the police vehicle, okay. Now, can I tell you what I noticed about that video, Robert, that I have a question about?

A You — you're entitled to your opinion.

Q No, not an opinion. I have just simply a question. You can answer it, okay. On the Wal-Mart video you were wearing a black do-rag.

A Yes, sir.

Q On the video when you were pulled out of the vehicle you were wearing a black do-rag?

A Well, on the Wal-Mart video I was not wearing a black do-rag because it wasn't me.

Q Well, let me put it like this. I apologize. The individual that was on the video was wearing a black do-rag on his head.

A Yes, sir.

Q You saw that, right?

A Yes, sir.

Q And when you were pulled out of the vehicle you were wearing a black do-rag?

A Yes, yes. Yes, sir.

Q Okay. And it was — do you understand how it would be easy for somebody to say, well, if the person in the video in Wal-Mart had a black do-rag on —

A That's speculation, Mr. English.

Q Let me just finish. And when Robert was pulled out of the truck he had a black do-rag on —

A Uh-huh.

Q — that had to be Robert at Wal-Mart buying the video.

A No, sir.

Q Do you understand how somebody could make that speculation?

A Well, yeah, anybody can make a speculation and intuitions, but that don't mean it's that person. You have to —

Q And so —

A You have to be sure, Mr. English. The jury sat on this panel said they was going to listen to all to be sure about the facts. We're not trying to mislead someone to

say, well, it looked like him, so it's him. You can't say that a duck is a duck unless you know it's a duck.

Q Okay. And so that's pure coincidence?

A I'm not speaking of pure coincidence. I'm —

Q No, I'm saying — No, I'm asking you a question. I'm just asking you a question. I'm going to move on. The fact that the individual wearing the do-rag in Wal-Mart and you had on a — what looks like the same do-rag when you were pulled out of the truck that's just coincidence?

A Well, Mr. English, do you know how many do-rags in Wal-Mart look the same?

Q Millions.

A Do you know how many people walk —

Q Millions.

A — through Wal-Mart with do-rags on their heads?

Q Millions.

A So let's move on, sir.

Q Okay. All right. Now, the officer testifies —

MR. ENGLISH:

Can I see Exhibit — I believe it's 74, the weapon. Is it 74?

MR. MARVIN:

What?

MR. ENGLISH:

The — the alleged murder weapon. Is that Exhibit 74?

THE COURT:

Seventy-four.

MR. MARVIN:

Hold on. Hold on.

MR. ENGLISH:

Okay.

MR. MARVIN:

We're not fixing to give that guy a gun in here.

MR, ENGLISH:

No, Mr. — Mr. — Mr. Marvin. And I object to that statement.

MR, McCOY:

And I do too, Your Honor.

MR. ENGLISH:

That would mean that I'm stupid and everybody in this room is stupid. We're not giving anybody a gun. Okay. All right.

Q In this box is the murder weapon, okay?

A Well, in that box is what they say is the murder weapon.

Q Let me say this here. You saw pictures up on the screen –

A I seen very —

Q —of the — of a .38, correct?

A I've seen —

Q That's in that box, correct?

A Yes, sir, I have.

Q All right. Have you ever seen that weapon before?

A Yes, sir, I have.

Q Where you saw it at?

A When Mr. Roberts put it in the doggone truck.

Q Who is Mr. — The truck driver?

A No, this is the police that sat up here.

Q Oh, the police officer?

A Yes, sir.

Q When he arrested you he put that weapon in that truck?

A They didn't find a weapon in that truck period at first. And then as he communicated with you he was told that I would possibly be having a .380 weapon.

Q Okay.

A And the possible weapons of most police are .380 sidearms. They're — they're a back-up weapon. I do my research, Mr. English.

Q So I want to be clear. The weapon that was found in the car, you didn't put that weapon in the car?

A No, sir.

Q The — the officer who testified here yesterday from the Idaho Police Department, he put the weapon in the car?

A Yes. He also told you that he was in constant communication with Mr. Humphrey there that has the smirk on his face right there.

Q Okay. All right. And do you know why the officer put the weapon in the vehicle? Why would he — was he in — was he in a conspiracy with Officer Humphrey?

A Yes, sir.

Q So you think Officer Humphrey called him and told him to plant the weapon in the truck?

A I'm pretty sure he did because they done spent a lot of money dramatizing this venue and putting me on television like I'm a monster. They're not going to come out short.

Q Okay.

A They're going to cross every — They're going to dot all "I's" and cross all "T's".

Q Okay.

A But I'm letting them — the venue know right now I'm no monster. I'm no wife — no cold-blooded killer. I'm a good man. I'm a Christian man.

Q Okay, Robert, let me stop you. I want to be clear and we're going to move on. So the murder weapon in the car you had never seen?

A No, sir.

Q And Detective Humphrey and the Idaho Police Department entered into a conspiracy to get you?

A Police departments work together Mr. English.

Q Okay. Now —

A That was the biggest case Idaho probably have ever had or ever been involved with and do you think they're going use those tax dollars and man time to just throw it away? They're going to get a positive aspect out of anything that they do.

Q Okay. So, Robert, you were then arrested, correct?

A Yes, I was, sir.

Q Now, you heard the officer yesterday and you heard Detective Humphrey when I asked him —

A I heard them quite clearly, sir.

Q — on 5-12-08 according to the Lewiston Police Department an officer, Richard Smith —

A Richard Smith, I don't know him.

Q That's — that's okay. Came into the cell and saw you hanging from the cell with sheets which you had wrapped around your neck, you were unconscious and that you had attempted suicide?

A No, sir. Once again, I love me. Also, if you would vindicate, Mr. English, on the photos once they arrested me after you seen when both of my eyes were swollen shut, you seen when my face was swollen shut. The crime lab woman that vindicated on that shirt there was blood on my shirt. She also vindicated it was two types of blood on my shirt.

Q Well, Robert, I want to — I want to state for —

A Whoa, let me — let me speak here.

Q All right. Okay.

A And she also vindicated there was two types of blood on my shirt. They did the DNA and they vindicated it was my blood and someone else's, but it wasn't the victims' blood.

Q Because Robert —

A Well, hold on, let me — let me — let me finish, sir.

Q Okay. All right.

A And the blood that it was was one of the officers that beat me.

Q Okay. So — so you never attempted to commit suicide in Idaho?

A No.

Q The officers beat you and they're lying?

A They're lying through their teeth.

Q Okay.

A And then also to vindicate it, what audio — what video do they have?

Q Let me — let me — let me go back.

A And also the doctor at the hospital vindicated that I did not try to commit suicide. I would have a black laceration mark around my neck for the rest of my life.

Q Okay.

A Facts are facts.

Q Let me — let me just go back to the — to the weapon.

A Yes.

Q Did you see the officer cock the weapon and place it behind the — in the vehicle?

A I didn't see none of that, Mr. English.

Q But you did — but you know he placed it into the vehicle?

A I know he placed it in there.

Q All right, Robert. Okay. And then, Robert, isn't it true you were put on a suicide watch while you were in –

A Lewiston.

Q — Lewiston, is that true?

A Yes, sir. Yes, I was.

Q But you're saying that's all a sham to cover-up the fact that they had beat you?

A Yes, sir.

Q Okay.

(SCREEN BEING LOWERED BY COURT REPORTER)

MR. ENGLISH:

All y'all finished? That's kind of distracting.

MR. MARVIN:

She did that. I'm sorry.

MR. ENGLISH:

Okay, I'm sorry.

MADAM CLERK:

It has to warm up.

MR. ENGLISH:

All right, I'm sorry. Okay.

Q On 5-14-08 you were brought back to Bossier Parish, correct?

A Yes. But let's stay in Lewiston right now.

Q All right. What do you want to say about Lewiston?

A When I went to the court and the Lewiston magistrate dismissed two charges that they put against me — Read out for the record the charges they put against me.

Q So you're saying in Lewiston — I'm — I don't dispute that. I think it's undisputed in Lewiston they dropped — they had some — they had brought some weapon charges against you and they — and they dismissed all those charges against you.

A Yeah. You also heard Mr. Roberts mention yesterday that this so-called firearm was behind the seat. And I also want to vindicate something from here. I'm right-handed. If my chair was turned this way and they said this gun was cocked in this direction —

THE COURT:

Mr. McCoy, let me make sure that you're next to a microphone.

MR. McCOY:

Yes, sir. Yes, sir.

A And they said this gun was cocked in this direction. I'm right-handed. If I was to grab a firearm and try to put anything behind the seat it would be pointed in that direction. I'm not left-handed.

Q Okay.

A And also to vindicate a more vague point here is that they have blackened — blackened aspects that they can swab and see for fingerprints. You — They also vindicated that they didn't check for fingerprints at the crime lab because they wasn't requested. But if the DA's office and if the judicial district really wanted to see who had that gun they would have vindicated fingerprints. They vindicated DNA to see whose that blood was.

Q Okay.

A They wasn't trying to see who that gun belonged to.

Q All right.

A Because they already had the person that they was going to try to put it on.

Q Okay, Robert. I want to — I need to — I need to ask you a few more questions, okay. On 6-8-08, the records from the Bossier Max show that you again attempted to commit suicide. And their records say suspicion of attempted suicide by following razor — by swallowing a razor blade. EMS noted there was blood —

A Everywhere.

Q — and feces everywhere in the jail cell.

A Everywhere. Everywhere.

Q So, Robert, on — on 6-8-08 did you attempt to commit suicide again by swallowing razor blades?

A No, sir. Ever since I've been at the Bossier Max I've always — I also filed a federal lawsuit vindicating this — they've beat me consistently. They've beat me consistently in handcuffs. That night of that same incident it felt like something ruptured in my stomach from the constant beatings. And I bled all over the cell. I tried to get up and put my fingerprint on the wall. I fell. I bled four and a half units of blood, ladies and gentlemens, out of my rectum from the beatings that they have put on me at Bossier Max. Four and a half units of blood, ladies and gentlemens. Then they went to the same — the same police officer went to the hospital and told them I swallowed a razor blade. They did a colonoscopy on me and put a camera tube down my throat and up my colon. There was nothing in there. I have the medical records, 479 pages of medical records that vindicated that I —

Q Okay, Robert.

A — did not try to commit suicide. I entered it into the record here. They haven't showed you all these records —

Q Oh, okay.

A — because they don't want you all to know the truth.

Q Okay, Robert. Officer Deputy Rawlins in the records noted that when he saw you, "McCoy was squatting in C101 trying to wipe blood and feces from his rectum." '

A That's right.

Q "There was fecal matter in a pool of blood on the floor.

A That's right.

Q You were not attempting to commit suicide? That was from a beating from a police is what you're saying?

A Yes, sir. Constant abuse.

Q Okay. EMS came and picked you up, correct?

A That's exactly right.

Q And they took you to LSU, correct?

A That's right. And I was unconscious as they will tell you in the report.

Q Okay. And they had to give you a significant amount of blood transfusion, correct?

A That's right. Yes, sir. And as we move further, that's not the only beating incident. It's — it's more to come.

Q So the police has consistently beated you — beaten you, correct?

A Yes — yes, sir. And not to be rude or vague about anything, they shot me with a Taser. I have all the proof right here on my arms, ladies and gentlemen.

Q So, Robert, on —

A I'm — I'm physical proof here.

Q Robert, on 7-21-08, the records show that the —

A What date is that again, sir?

Q 7-21-08, Bossier Max Records Incident Report showed that they again had to intervene because —

A It was one before that, the 13th, sir. After I came back from the hospital three days later — eight, nine, ten — yeah, four days later they beat me again in the shower area.

Q They beat you — they beat you again in the shower area?

A Yes, sir.

Q And there's a video camera that caught the whole incident. I made sure I went out in the hall when they was beating me. I was in total submission. I wasn't in aggression. I had my hands behind my back. I was on my knees and I laid down to show them that I was not the aggressor. In perspective of me doing that they still Tased me, they still kicked me, they still struck me with open fists. And to show you that I'm not a bad and naive person, Mr. Robert Parker, that's sitting before you was the gentlemen when I was soaking wet that Tased me from my left leg; that Tased me —

Q Now, who — who — I'm sorry. Who is Mr. Robert Parker?

A That's sitting right before you.

Q Right there?

A Yes, sir. Yes, sir.

Q Mr. Robert Parker Tased you in the shower?

A No, Tased me on the outside of the shower.

Q He did?

A Yes, sir, in the hallway in front of the cameras, ladies and gentlemen. And Mr. —

Q And why did — and why did he Taser you Robert?

A Wait, a minute. Let me tell you — finish my story, sir.

Q Okay.

A He Tased me while I was soaking wet coming out of the shower on my left leg, my right leg and my — and my chest area on my heart.

Q Okay. And —

A He had —he had instructions to do what he did, sir. I don't fault Mr. Parker for doing what he did because when you get superior orders from people upstairs you're going to vindicate what you was told to do. And saying this to say that, I have no animosity against Mr. Parker. I love him like a brother.

Q Okay, Robert. And then on another suicide attempt according to the records, you were observed coughing up and it was determined that you had swallowed large amounts of toilet paper or either the Bible. There's been conflicting evidence. And you tried to commit yourself by suffocating yourself by stuffing paper down your throat.

A So they're basically telling you I'm full of the Word?

Q I — I don't know, Robert.

A No, I had —

Q Did you attempt to commit suicide on that time?

A No. I had a bad toothache and they wouldn't take me to the — the medics. So I put some tissue on the right side of my mouth to — You know, when you breathe in cold air and you've got a nerve problem in your mouth it kind of helps it. And I swallowed the paper, sir. There was no suicide attempt there.

Q There was no suicide attempt?

A No, sir. They know it. They was right there. I was in the observation window right beside the booking desk. And, as a matter of fact, there was two detectives there as well.

Q Okay, Robert. On 7-29-08, Sergeant Gauthier — I hope I'm pronouncing his name right.

A You're talking about Sergeant Gauthier.

Q Sergeant Gauthier. In his report he indicated, "McCoy was found on the right side of the cell, bloody, slightly visible along the bottom of the mat and unresponsive, observed large amounts coming from Robert McCoy's right arm.

A Yes, sir. Sergeant Gauthier is the one —

Q Let me finish, Robert.

A Okay.

Q Let me ask you the question. According to the incident reports —

A Uh-huh.

Q — you attempted to commit suicide by chewing into your arm to bleed to death. You chewed into your right arm to bleed to death. What's your — And, again, is that true? I mean that's what they're saying in the reports. Is that true?

A Well, I'm going to say this, no, it's not true. I think I look pretty decent, but I'm never going to try to taste myself and see how I taste.

Q Now, it wasn't the — it wasn't to taste yourself, Robert.

It was to kill yourself.

A No, no, no.

Q You never –

A No.

Q You never chewed into your right arm —

A No, Sergeant Gauthier —

Q —to attempt to kill yourself?

A No. Two days before that Sergeant Gauthier shot me with a Taser with the prongs on it and jerked them out. This is where he ripped my main artery in my arm. And under this Taser belt is two long lacerations in which he pulled the Taser prongs out. I had blood shooting from here to all the way over there where the jury members are at.

Q So — so — so — so why were you — so why were you bleeding — so on the day where you — they alleged you tried to chew through your arm –

A Uh-huh.

Q — and kill yourself?

A They had wrapped it up, sir.

Q No, but I'm asking you how did that — Why were you bleeding? You were bleeding so bad that they had to call EMS and rush you to the hospital.

A No, they tried to —

Q Why were you bleeding?

A They tried to doctor on it themselves.

Q What happened to your arm?

A They shot me with the Taser and ripped my main vein out.

Q Okay. And the records show that when the EMS was taking you to the hospital the report says while in — while McCoy got his right arm free and began clawing his leg while trying to place gauze and bandage on McCoy's right hand, McCoy grabbed the EMT's pant leg. McCoy's right wrist was placed in handcuffs and restrained with a stretcher — with a structure. McCoy was trying to bite and chew at the plastic oxygen mask that they had over your face. Do you remember that, Robert?

A I was unconscious. I don't remember none of that.

Q You don't remember none of that?

A None of that. None of that.

Q He refused to obey commands, would not stop fighting against the medical staff so they could treat him.

A No.

Q And, in fact, Robert, in the hospital the records show on 730-09 that you were fighting so hard to continue to try to kill yourself the records show that McCoy remains on the vent, stable. Do you know what that means, Robert?

A No, I remained on the vent because I couldn't breathe on my own. That's why I remained on the vent, sir. Let's not get this construed.

Q Dr. Mark —

A I couldn't breathe on my own.

Q Dr. Mark Vigen will testify, Robert.

A Dr. Mark Vigen is not the doctor at the hospital, sir.

Q May I finish? May I finish? May I finish? And the medical records show, Robert, that you were so intent on killing yourself that they had to shoot you with muscle relaxers and put you out so that you wouldn't try to kill yourself?

A No, sir.

Q That's why you were on the vent.

A No, sir. No, sir.

Q Not because you couldn't breathe, but because –

A No, sir. I —

Q — you were so out of control, Robert, they — they — you were fighting them so hard –

A Uh-huh.

Q —to continue to try to kill yourself that they put — they had to knock you out?

A No, sir.

Q That didn't happen?

A No, sir. No, sir. And to vindicate in that process they was sticking tubes down my nose to try and get it in my body. Just sticking them in there and then eventually I had asked them tell me how to help you because they was telling me I had to swallow with it in order to help the tube go down. But, as far as vindicated fighting, if you will read in the medical report they also

vindicate that I cooperated with them too. It has the aspects on — it will tell you cooperative, uncooperative, so forth and so on. So I mean —

Q Okay, Robert.

A — are you reading from the medical reports or are you just vindicating what the State is saying?

Q I'm — We're reading from the medical reports. Okay, Robert, I have just a few more questions, okay. Now, you indicate — I want to — that Detective Humphrey and the Bossier Parish police are involved in drugs, you exposed them and the reason why we're here is they're trying to get rid of you, correct?

A Yes, sir. Yes, sir.

Q And, in fact, you told — you contacted the FBI, correct?

A Yes, sir, I contacted Mr. J. T. Coleman.

Q And, in fact, you tried to subpoena Mr. Coleman for this trial, right?

A Yes, sir, and they wouldn't let me subpoena Mr. Coleman because Mr. Coleman know everything about their dirty drug dealing activities. Mr. Coleman is a higher authority. Mr. Coleman investigated Mr. Richard McGee doing all the drug dealing aspects. He's investigated Mr. Robert Thomas through all the aspects of this aspiration. But they don't want those individuals to come to court to vindicate the testimony, ladies and gentlemen of the jury, because they've been hiding stuff like this for so long. They've been beating people for so long, ladies and gentlemen.

And that's what they do.

Q Okay.

A They try to beat you to make you confess. They try to beat you to make you submit. I'm not submitting to anything that I didn't do.

Q Okay, Robert. Okay, Robert, I have a few more questions. And also you want to subpoena United States Senator David Vitter, correct?

A Yes, sir.

Q Why do you want David — why do you want David Vitter to come testify?

A I subpoenaed Mr. David Vitter because I also sent Mr. David Vitter my medical records. I know Mr. David Vitter personally and Mr. David Vitter knows everything that goes on with me. When I sent Mr. David Vitter the medical records Mr. David Vitter thought I was Department of Corrections. He sent the Department of Corrections that same medical brochure letting them know how bad these people beat me. He wasn't happy with it. And the Department of Corrections wrote the Internal Affairs in Bossier City and Internal Affairs in Bossier City brushed it off. So I had to write the FBI in Pennsylvania down there by the White House to try and get more aspects to it. And they will tell you now, the Bossier City Sheriff's Department, the Bossier City Police Department and certain aspects of this courthouse is up under federal investigation now, ladies and gentlemen. There's a lot that —

Q Let me stop you. Let me — let me stop you, Robert.

A — they're not telling you all.

Q Robert — Robert, let me stop you. You say that the FBI is investigating individuals in this courthouse?

A Yes, sir.

Q And you're saying United States — David Vitter, does he know all about the criminal activity of Humphrey?

A I told him everything, sir.

Q And — and the other Bossier — Bossier Parish Police Department people that are engaged in drug dealing?

A I told him — I told him everything and that is why they did not want Mr. Vitter to come because Mr. Vitter has nothing to vindicate. Mr. Vitter's going to tell the truth from what he knows.

Q So you believe that if you had been allowed to subpoena United States Senator David Vitter to testify here he would corroborate what you're saying?

A Yes, sir. And if I was able to subpoena Mr. J. T. Coleman he would corroborate with what I was saying. I wrote Mr. J. T. Coleman to subpoena him from Arkansas. Mr. Schuyler Marvin vindicated that my subpoena wasn't valid, but the federal marshal's did not vindicate it. They told me I need to vindicate why I needed this agent to come and testify on my behalf. I did that. They were so adamant about keeping the truth out of this courtroom they told me I didn't go through proper form and fashion to get it. I went through the clerk of court's office to subpoena these individuals.

Q All right, Robert — Robert, I have few more — I have one more questions — a couple of more questions and then I'm going to tender you to the district attorney. You also wanted to subpoena Marcus Hines. Who is Marcus Hines?

A Marcus Hines is a Shreveport police officer that was personally involved in this matter. Mr. Humphrey

got on the stand and straight up lied yesterday about the description of the assailant that was given by the eyewitness. Mr. Marcus Hines — or one of his fellow comrades relayed that description to Mr. Marcus Hines. Mr. Marcus Hines and four more police officers went to my parents' house at 7323 Altus Loop in Shreveport, Louisiana, to vindicate was that me. They looked at a picture and said that that wasn't Mr. McCoy. They called Mr. Humphrey and them back and told them that that wasn't me. But Mr. Humphrey and them was on such of a vengeful rage they sent their whole SWAT Team over to my mom and them's house and Mr. —Mr. —Mr. Hines had already told them it wasn't me. Their description doesn't — does not match me. But they sent them over there anyway. This is personal, ladies and gentlemen. And I thank God that I'm here to tell you all this. They didn't want me to come to trial today, ladies and gentlemen. They didn't want me to come to trial for over three years, ladies and gentlemen. They have been trying to get me to cop out to something that I haven't done. As you see, they have been going around the corners to get to where they want to go, ladies and gentlemens. This isn't fair. This isn't justice, ladies and gentlemens, that we're going through today. The police officers are supposed to uphold the law, not break the law. Ladies and gentlemens, they're breaking the law right up under y'all's noses. They're committing crimes, ladies and gentlemens, right up under y'all's noses and trying to vindicate that because they're authority figures they can do what they want to do. No, it's a rule of law for everybody from the most strong politician to the less powerful individual. It's subject to the law for what he or she does even the ones that's wearing the badge, ladies and gentlemens. They're subject to the law. The law is breaking the law, ladies and gentlemens. We're got rogue cops

among us, ladies and gentlemens. We've got rogue cops amongst us and they know it. That's why they don't want this information into the courtroom, ladies and gentlemen. That's why they have beat me saying I'm trying to commit suicide. Ladies and gentlemens, I love me. I love my family. There is no way that I'm going to admit to three counts of first degree murder when I didn't do it. There is no way that I'm going to vindicate that I was involved in something — the only reason that I'm here today, ladies and gentlemens, is because I was trying to take up for my brother that I love. My brother was collaborating in this stuff transporting drugs back and forth, ladies and gentlemen. My brother which is dead now. You see they didn't mention that to the courthouse. Mr. —

Q Okay, Robert. Robert, I'm going to have to —

A No, let me talk.

Q Okay.

A Mr. Humphrey and Mr. Griffith and Mr. Stewart pressured my brother to the extent that my brother had an aneurysm of the brain. They knew my brother was on drugs, ladies and gentlemens. And my brother was taking all type of medication. My brother passed away. They mentioned my three family members, but they didn't mention my brother, ladies and gentlemens. They're hiding a lot of information from you, ladies and gentlemens. They pressured my brother. They coerced my brother. They kept coming to the house, ladies and gentlemens, to try and make my brother vindicate falsified —

Q All right, Robert.

A — statements on me, ladies and gentlemens.

Q All right, Robert. Okay, Robert.

A I come here to tell y'all the truth, ladies and gentlemens.

Q Okay, Robert. Robert — Okay, Robert. I am now going to tender you to the district attorney if he has some questions for you, okay.

A Okay. Yes, sir.

Q Are you going to answer his questions?

A Yes, sir.

Q Okay.

THE COURT:

Mr. Marvin, I'm going to take a — about a ten-minute recess at this point.

MR. MARVIN:

Okay.

THE COURT:

If you'll all rise for the jury.

MR. SHERIFF:

All rise for the jury.

THE COURT:

Jury do not discuss this.

(JURY ESCORTED OUT OF COURTROOM)

THE COURT:

All right, Mr. McCoy, I'll let you go sit back in your seat for just a minute, please, sir.

MR. McCOY:

Yes, sir.

THE COURT:

Thank you, sir. We'll take a fifteen-minute recess.

MR. ENGLISH:

Okay.

MR. SHERIFF:

Court's in recess for fifteen minutes.

(COURT RECESSES)

THE COURT:

All right, let's call the court to order, please.

MR. SHERIFF:

You may remain seated. Come to order. Court is in session.

(COURT RECONVENES)

THE COURT:

All right, Mr. Marvin, are you ready to proceed, sir?

MR. MARVIN:

Yes, sir, Judge.

THE COURT:

Mr. English, you're present and ready to proceed again, sir?

MR. ENGLISH:

Yes, Your Honor.

THE COURT:

All right. Mr. McCoy is present. Take the stand. Okay. We're ready to bring in the jury, please.

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED INTO COURTROOM)

MR. SHERIFF:

All jurors are present, Your Honor.

THE COURT:

All right. You may be seated. All right, Mr. Marvin, you may proceed, sir.

CROSS-EXAMINATION

BY MR. MARVIN:

Q Mr. McCoy, which Robert was it that you said committed these murders?

A Robert Thomas, sir.

Q Robert Thomas, okay. Okay. And you said it was because Willie Young owed him $2500?

A It's buying drugs, Mr. Marvin.

Q Okay. Twenty — Let me see if I understand that right, $2500 for drugs?

A Yes, sir.

Q Okay. I want you to listen to this tape just a minute.

(911 TAPE PLAYED)

Q Okay. Did you recognize Christine Coleman's voice? Colston?

A I know exactly who she is, sir.

Q But did you recognize her voice on that tape?

A I know exactly who she is, sir.

Q Did you recognize her voice on the tape? It's a simple question.

A I know exactly who she is, sir.

Q Mr. McCoy —

A I don't have to answer the question in your form or —

Q Yeah, you do. You're under cross-examination —

A No, I don't.

Q — buddy.

A No, I don' t.

THE COURT:

All right, Mr. Marvin and Mr. McCoy. Mr. McCoy, you will answer the questions. He has the right to ask the questions. Answer the questions. Your attorney will have the right to redirect in a minute. All right, you may proceed, Mr. Marvin.

MR. MARVIN:

Yes, sir.

A I recognize the voice, sir.

Q You did. Okay. Why on that tape isn't Christine Colston at any point saying, we don't have the money? We don't have the $2500? Or we only have $500 of it?

A I can't speculate that, Mr. Marvin.

Q Really?

A No.

Q Well, you speculated to an awful lot thirty minutes ago?

A No, I ain't speculating. I'm telling you something that I know that you should have told the people a long time ago.

Q I'm just wondering why Christine Colson — Colston kept saying she's not here, she ain't here, Robert.

A Whomever wasn't there, an occupant of that house, whomever — I'm not speculating who that was, but it was more than three people in that house at one point in time. And there was another female in that house, Mr. Marvin, as you know and your documents vindicate as well, sir.

Q Well, I'm just wondering why Christine Colston, whose voice you've identified, never referred to anything about drugs or anything about money for drugs or any debt that was owed. Her whole response to the dispatcher that we heard, that I heard, and I hope you heard –

A I heard.

Q — she's, she's not here, Robert. She's with the detectives. The detectives got her, Robert. She ain't here, I swear to God.

A Okay.

Q So why didn't — anywhere on that tape was there not a mention of the — the money?

A So you're asking me to speak for her? I can't do it, sir.

Q Do you have an idea? Do you have any idea?

A No, sir. No, sir, I can't speak —

Q None?

A — for her, sir.

Q Okay, that's fair enough. And — and the — the beatings that you suffered, you understand that the Bossier Maximum jail facility is operated by the Bossier Sheriff's Office?

A I know it's operated by Mr. Larry Deen. I have sued him on a couple of occasions for the aspect of denying that he knew nothing of it. And they've got a past history of beating people.

Q Okay. Yes or no, do you understand that it's operated by the Bossier Sheriff's Department?

A I understand that.

Q Okay. Do you agree that this triple homicide case that occurred inside the city limits of Bossier City has been investigated solely by the Bossier City Police Department, not the sheriff's office?

A Well, that's what they say.

Q Okay. But you understand that no Bossier City police officer has anything to do with the management or any policies up at that Bossier Max whatsoever?

A Law enforcement corresponds, Mr. Schuyler Marvin.

Q Okay. So you believe –

A So that picture that you're drawing is insufficient. They — they — they correspond. They do everything together, sir.

Q So any police agency anywhere even in Idaho —

A They cor — they correspond.

Q So, I need you to go plant some evidence —

A Law enforcement is law enforcement.

Q — in a murder case?

A Law enforcement is law enforcement, sir.

Q Okay. Now, Officer Roberts had testified yesterday from Idaho.

A Uh-huh.

Q He didn't really strike me as somebody that would do something like that?

A Well, don't nobody strike you that's going to do something like that when they're in your favor, sir.

Q Okay. Because that's — that's a big deal.

A But Mr. Houston struck you to be a different person when you started bringing up his background when he wasn't saying what you wanted him to say on the stand, sir. But he struck you to be that person, but at first he didn't because you subpoenaed him to come. But after he was saying what you didn't want him to hear or what you didn't want the potential jurors and the vindicating people to hear, oh, it was a different aspect then. And also Ms. Moore was the same aspect.

Q Okay. You know that subpoenas are how we get people to come to court?

A Well, Ms. Moore specifically stated —

Q You know that Detective Humphrey has a subpoena to be here today?

A Oh, I got the subpoenas on my thing over there, sir.

Q Okay.

A I'm very familiar with everything that's going on. You subpoenaed like twenty-four people, but didn't nothing but twelve or thirteen come. You're trying to intimidate a person to make you think you have more

than what you have, sir. Your tactics are not working, Mr. Marvin.

Q You had a conversation with Sharon Moore on or about May 5th, yes or no, over a cell phone?

A May the 5th?

Q Uh-huh.

A No.

Q Of 2008?

A No.

Q None?

A None.

Q That was your buddy that had your phone?

A It was — As I told you it was between the 4th and the 7th when I spoke with her.

Q Okay. Well, the 5th is between the 4th and the 7th.

A Yeah. No, no particular conversation on that night, sir.

Q Okay. So the conversation that she testified about under oath is a lie?

A You got her to lie.

Q I did?

A Yes, you did.

Q Okay.

A You get everybody to lie. If they don't lie, they go to jail. Oh, and as a matter of fact, to bring the issue to the courtroom, do you remember Mr. Josh — Mr. Vasquez that you got to try to perjure Mr. Willie Young to get Mr. Willie Young two life sentences in jail

that you got an inmate to lie on another inmate that Mr. Brian Griffith got Mr. Josh Disotell to lie and say that I told him that I killed my family in the jail. That's the type of stuff y'all do, sir. That's the stuff — type stuff y'all do and admit it into the courtroom — admit it into the courtroom. So, for the record, Mr. Marvin, did you or did you not know that, sir?

Q You know what?

A You ain't going to answer.

Q You're right.

A I know it because it's the truth.

Q I recognize one name in there, Willie Young. He's serving two life sentences for killing two people.

A His name is Willie Jones, sir.

Q Willie Jones. That's the same guy we're — you're talking about?

A You know who I'm talking about. You're very familiar with who I'm talking about.

Q So he didn't get the punishment he deserved, I assume?

A Well, I can't quote a sentence for somebody else, but that's what you're trying to do, quote the sentence for someone else. I mean who made you the judge and the jury.

Q I'm not the judge and the jury. Mr. McCoy, on May 5th, 2008, were you employed? Did you have a job?

A I was employed way before that aspect. I told my employee after —

Q No. No. On May the 5th, did you –

A Excuse me.

Q — have a job or had you left it — your job?

A I was on leave, sir, because I told my employees about what was going on. Mr. Humphrey and his crew so vaguely put a warrant out —

Q So to answer my question in a simple form, no, you were not employed –

A Well, no, you can't —

Q —on May the 5th?

A I'm answering your question, but you can't stop me from talking, sir.

MR. ENGLISH:

Your Honor, Your Honor — Hold on, Mr. McCoy. Mr. McCoy. Your Honor, I have just a simple objection. I would ask the district attorney to allow him to answer the question.

MR. McCOY:

That's right.

THE COURT:

All right, Mr. McCoy —

MR. MARVIN:

Well, it's a yes or no question.

THE COURT:

All right, Mr. Marvin and Mr. English. Mr. Marvin, I will sustain. Mr. McCoy —

MR. McCOY:

Yes, sir.

THE COURT:

— answer the question. You'll be allowed to expound on the answer at the proper time.

MR. McCOY:

Yes, sir.

THE COURT:

All right. So answer the question directly, then you'll be allowed to expound on that answer.

MR. McCOY:

Yes, sir, Your Honor.

THE COURT:

— at the proper time.

MR. McCOY:

Yes, sir.

THE COURT:

All right. Thank you.

Q My question is a simple yes or no. Either one of the two will do.

A Redirect your question, sir.

Q I'll do that. Did — Were you employed on May the 5th, 2008

A I was on leave, sir.

Q Okay. So your answer is no?

A I didn't say that, sir. You — you're trying to answer for me. I'm telling you I was on leave.

Q Okay. Well –

A So I was on leave means I wasn't there at the present point in time, sir. I received no pink slip. I re-

ceived no aspects of my employer telling me that I was terminated.

Q You simply just didn't go back to work?

A I gave him a valid reason why I wasn't coming. They know about Mr. Humphrey and them. Mr. Humphrey and them went on my job trying to arrest me, sir.

Q Let me ask you another way then. Were you getting a pay check on May the 5th for any labor that you performed for anybody?

A My pay checks go direct deposit, sir.

Q Were you getting a pay check for any labor that you performed for anybody on May the 5th?

A No, sir.

Q All right. This can be simple. I ask the questions –

A Well, please —

Q Answer my question. That's all I ask. I don't need a big long explanation about anything. It's very simple.

A Well, you can't tell me how to talk, Mr. Marvin. I've got freedom of speech, sir. But I'm going to vindicate what the judge said.

Q All right. Stop. I ask questions. You answer them. Okay. Did you know Gregory Colston?

A I knew him well, sir, and I loved him.

Q Did you know today's his birthday? You didn't know that, did you?

A No, sir, I didn't.

Q Did you shoot him between the eyes with a .380 caliber pistol?

A No, sir, I didn't and never would have.

Q Did you shoot Christine Colston?

A No, sir. And I didn't shoot Mr. Willie Young neither, sir, if that's where you're going.

Q Did you shoot Willie Young?

A No, sir.

Q And you're not responsible for their deaths?

A No, sir, in no way, form or fashion.

Q And if Sharon Moore wouldn't have come in here and lied on you, and Gayle Houston wouldn't have come and lied on you, and Officer Roberts from Idaho wouldn't have lied on you, and all these Bossier City officers, and Ms. White from the crime lab wouldn't have lied — Did anybody come in here and tell the truth besides you?

A I can't speak for nobody else, Mr. Marvin. I can't speak for nobody else. But there's no one that can put me on the scene of this crime, sir, and you know that. And that's what has to be done in order to convict me. You have to put me on the scene of this crime and you can't, sir.

Q Really?

A Oh, most definitely.

Q Okay. Wait around a little while. Have a good day.

A I will. You too.

THE COURT:

Ladies and gentlemen —

MR. ENGLISH:

Your Honor, I think it's important that I note an objection to that last statement. It was argumentative and uncalled for, Your Honor.

THE COURT:

All right. I will sustain that objection and instruct the jury to disregard that statement. And also, ladies and gentlemen, there will be no outbursts in the audience. Even though it was not a loud outburst, I will not allow any outbursts from the audience. Mr. English, do you want to — wish to redirect, sir?

MR. ENGLISH:

No redirect —no redirect, Your Honor.

THE COURT:

All right. You may step down, Mr. McCoy, and go sit next to Mr. English, please, sir.

MR. McCOY:

Thank you, sir.

THE COURT:

Any other witnesses, Mr. English?

MR. ENGLISH:

The defense rests, Your Honor.

(DEFENSE RESTS)

THE COURT:

All right. Mr. Marvin?

MR. MARVIN:

We offer no rebuttal. We're ready for closing arguments.

THE COURT:

All right. Ladies and gentlemen, prior to going to closing arguments, I'm going to give another ten-minute recess for the jury.

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED OUT OF COURTROOM)

* * *

(MARVIN – CLOSING ARGUMENT)

MR. MARVIN:

(TAPE OF 911 CALL PLAYED FOR JURY)

Ladies and gentlemen, that right there was the last thing that Gregory Colston heard in his life was his grandmother screaming, "She's not here, Robert. She's not here." Willie Young was probably already dead at that point. Now, I told you in my opening statement what the State would provide and I submit to you we've carried our burden. Robert McCoy chose to be here. His willingness to take the lives of three innocent victims entitles him to a seat at the defendant's table. He earned the right to be here. Those victims didn't choose to become victims. They had no choice whatsoever in any of this. Now, those three victims: First of all, Christine, whose voice you heard, I'm sure she was a strong lady. I didn't have the privilege of knowing her during her life, but she had to be pretty strong because you heard her refusing to tell Robert of Yolanda's whereabouts. And as it turns out, Yolanda was gone. She -- she had left. But Christine obviously had great love for Yolanda or she would have given up her whereabouts. Now, Yolanda, which you haven't met yet, is Gregory's mother. He would have been 21 years

old today. When you turn 21 in Louisiana a lot of things happen for you. You're able to get on the casinos. At eighteen you do a lot of things. Join the military and do some other things, but at 21 that's it. And if Greg were alive today, by all likelihood, he would be in college and have all the freedom of the world. But he doesn't. Now back to Yolanda. She made a very difficult decision in May of 2008, to get out of town and get away from Robert McCoy. But she had Greg who as a senior at Parkway High School and whose graduation was set near the end of May in 2008. So, rather than take him with her and upset his graduation she allowed him to say with his grandmother and finish the school year. Now, I know Yolanda knows this and if she could take that decision back she would. But she can't. So this capital murder case is not just about Greg Colston. I want you to understand that. It's horrible what happened to him. But this is about Willie Young and Christine Colston as well. Now, in the voir dire process we talked about different ways a case could be first degree. That it can be the killing of a police officer in the line of duty or killing somebody over sixty-five. We don't have any of that here. We have not alleged any of that. This is capital murder because more than three people were killed at the same time. And I told you in my opening statement that it's been eight and a half years. I've never sat in this courthouse and asked a jury to impose the death penalty since I've been elected district attorney. And we might should have gone to a little bit more of this during voir dire, but second degree murder – a lot of y'all talked about premeditation. And in Louisiana second degree murder, the definition of it is the same as first degree murder, the definition of it is the same as first degree murder: The killing of a human being when you have specific intent to kill or inflict great bodily harm. The only difference is, the only thing that makes

it first degree as opposed to second degree is when you kill more than one person at the same time. So, if a person out there in the audience looked at a person on the sidewalk and said, you know what, next Thursday at three o'clock I'm going to kill that guy and he goes to the store and he buys a gun, he buys some bullets and he goes to the target range and takes practice with his new gun, gets real good at it, goes to the clothing store and buys him a black ski mask and some fast tennis shoes so he can run away from them, and on Thursday at three o'clock he walked up to the -- walks up behind the guy and shoots him in the back of the head and kills him, that's second degree murder. The death penalty is not available, only a life sentence. This case is capital because more than one person was murdered. Now, Robert McCoy, on the other hand, look at his actions, judge his testimony as you heard from the stand, and I will get back to what he did in a minute, but what he did after these murders. What did he do? He fled. He got in that white car and drove away at a high rate of speed. You heard Officer Szyska tell you what he did and you saw it. You saw it on the video. Evidence of flight, concealment and attempt to avoid apprehension is relevant. If you find the defendant fled immediately after a crime was committed or after he was accused of a crime, the flight alone is not sufficient to prove that he's guilty. However, flight may be considered along with all -- all the other evidence. You must decide whether such flight was due to consciousness of guilt or to other reasons unrelated to guilt. Ladies and gentlemen, the State has proven that Robert McCoy's flight shows consciousness of his guilt. He was getting out of Dodge. At this point in the trial -- Let me back up a minute. Back during voir dire a lot of people again used the word premeditation or motive. And that's a natural reaction -- normal reaction to being put in your posi-

tion. It's natural to want to know, well, why -- why did they do that. Why did the person do a certain thing? Well, you will never hear the judge instruct you that we have to prove motive. The State doesn't have to prove it. All we have to prove is if the offender, Robert McCoy, had a specific intent to kill or to inflict great bodily harm upon more than one person. And you have to find that three times. We have three -- three counts here. Dr. -- I mean -- Yeah, Dr. Taylor told you -- Let me make sure I tell it right. Dr. Taylor told you that Willie and Greg -- Gregory had intermediate gunshot wounds. I didn't really know what intermediate meant. I kind of did, but -- So I asked him. From six to eighteen inches away. Six inches is about that far. Eighteen inches is about this far. They were shot in the head. So this is not a situation where anyone is going to argue to you that this was some kind of accidental event. This was a planned event. How do we know it's planned? We know it's planned because Sharon Moore told you Robert McCoy came to her house, asked her to borrow some money. Robert McCoy finally admitted that he wasn't working, didn't have any money. He wanted some money from her. What did he need money for? Five bullets, of course. You don't need any groceries or anything like that. You need bullets on the afternoon of May the 5th. Where did he get the money? She didn't give him the money. She told us that. Where did he get the money? I don't know. Mr. McCoy would probably argue to you I'm supposed to -- have to prove that too. But I don't have to prove that because we saw him in the Wal-Mart a few hours later buying bullets. Mr. Upshaw, I believe his name was, from Wal-Mart identified the -- the receipt that Officer Szyska found in the back of that white Kia. And Mr. Upshaw, in his capacity as a loss prevention employee of Wal-Mart, can identify that receipt and tell you exactly where it came

from, what store, what register, what time, how it was paid for, and you saw it on the screen. What did he -- what did he buy? Bullets. Same day, May the 5th, 2008. Now, Robert's version is interesting. And I've heard a lot in my career of doing this and there's always, things that don't match up in those kinds of stories, which is what they are. I'm sure Senator David Vitter or someone from the White House would be here and rat out all these nasty, dirty cops that we've got around here and we could clean everything up. They're all in cahoots to get him, of course, and frame him. I don't know why Ms. Colston's voice if this was a drug deal-- and there's no evidence of that whatsoever. These are just things you can just cherry pick it and pick some kind of wild hair version of something and say that's what happened. And apparently there's more Roberts involved in this case than any other case I've ever handled because Mr. McCoy has an excuse for where all the Roberts were on that night. Back to Yolanda for a minute. I don't know what would have happened had Yolanda been in that house that night. I have a good idea. I don't know what would have happened to Christine and Willie and Gregory had Yolanda had been there. Had he just taken Yolanda or had he just killed Yolanda or had he killed her and then killed all three of them as well to keep them from talking about the murder of Yolanda. I don't know. But I submit to you that those three victims would probably have still have been murdered by Robert McCoy. So why did he do it? If you'll get back to motive and say, well, why, why would he do it? Most of our murders around here are for money or -- or drugs. He's got a point there. There is -- there's some drug activity and murders are involved with that. So did he kill them -- did Robert McCoy kill those three people for money, to rob? Mr. Young still has his -- what looked to be a pret-

ty valuable watch on his hand and a ring on his finger. Or is it just like we heard on the 911 tape. Is it -- is it because they wouldn't tell him where Yolanda was? I don't know why Christine would have kept saying that. I don't know why she would have said, "She's not here, Robert. She's not here. The detectives have got her." Why the detectives? Because Detective Humphrey was hunting high and low for Robert McCoy personally. He had a warrant. You saw the warrant on the screen for aggravated battery. Domestic violence, a felony. Now, this -- And you know, some people might say, well, you know, the cops got a warrant, they put it in the computer system and the guy gets stopped in a traffic stop somewhere. Maybe they'll catch him. Maybe they won't. You know, cops don't work real hard. They just sit around behind a desk all day long. Well, Detective Humphrey, while he's working his second job on his security, he's told you – he's testified that he's told all these other officers be on the lookout. Anything that happens over there around Grace Lane look for the four-door Kia, four-door sedan with paper plates on it. That's Robert McCoy and I've got a -- I've got a warrant for him. Not only that, the night of May the 5th Detective Humphrey told you that he heard the call. The dispatcher says something to the effect any units, you know, in the area of 19 Grace Lane go respond and see what happened. We've had a 911 hangup call. Don't know -- don't know what it is. And the -- the representative from 911 told you that that's their policy. When we get a 911 hang-up call we dispatch a unit, whatever agency is in that jurisdiction, and go see what caused it. So, Detective Humphrey at that point immediately -- immediately got on the radio, the police radio, while he's off duty and radios Kary Szyska if you're responding look for that white car; look for that white car, paper plates, four-door car. And then you got to see

with your own eyes -and I'm very proud. We don't -- It's not all the time that we have as much video and -- and -- for trials like this. But you got to see Kary Szyska driving -- he was almost at 19 Grace Lane and here comes a white car in the opposite direction speeding past him. You saw him turn his police unit around and give chase. And I think you could tell from the video that the car was moving very fast. And he's pursuing the car. He told you that he had his lights on. And then you hear Officer Szyska immediately before he exits his car, he's bailed out. He's running. I've got -- He's going to run. And you see a figure jump out of that white car and run briefly in front of his camera on his car and run into the darkness. And you can see Officer Szyska get out of his unit and give foot pursuit. So, why did all this happen? You know, still getting back to motive. Again, I don't have to prove it and I'm not going to harp on it much longer. But why were these people murdered? There is a phrase for what this is -- this set of facts is called in the law and in society, it's called gratuitous violence. Gratuitous violence means you do it for free. You do it because you can. You don't do it for robbery. You don't do it for -- you've come home and catch your spouse in bed with another person. You don't do it out of rage. You do it because you can. Gratuitous violence, it's the worst kind of violence. That's what Robert McCoy is all about. I can tell you. Because there is no other intent, no other specific intent that you have in your mind when you place a .380 caliber handgun that far away from somebody and pull the trigger than to take their life. Now, I remember Dr. Traylor telling us ironically that Christine, her gunshot wound, was at close range. I said how close. What does close range mean? He said, well, close. No. He said one to two inches away. One to two inches away from her head that caused that

blast to break the skin into her face. Now, back to Yolanda. I want you to think about what she's had to go through. Who do you think had to go to the funeral home and pick out three caskets? I didn't do it. Detective Humphrey didn't do it. It's not our responsibility. Yolanda did it. Who do you think had to go to the bank, walk in to the bank teller and say, my mother -- I need to close her bank account. Really. Why? I liked your mother. She was a good customer here. Well, she was murdered. So who do you think had to do all that? Now, I told you in the beginning and I'm telling you now again, every murder case is not a death penalty case. Put that away for right now because I'm not asking for the death penalty at this point in time. I'm asking you to convict Robert McCoy of first degree murder. The State has carried its burden of proof. Each of you swore to God and told me under oath that if I carried my burden you could convict him of first degree murder. And we have done that. It takes all twelve of you to do that. So, I encourage you to talk amongst yourselves as much as you deem it necessary about this. And I hope that I've answered every question in every one of your minds. I told you in the beginning if I asked stupid questions and prolonged it, I'd apologize, but I don't know what's going through all twelve of your minds. But Judge Cox will instruct you that my burden of proof is beyond a reasonable doubt, not beyond all possible doubt, but beyond a reasonable doubt. There is -- there is no other doubt in this case for which you can give a good reason because there is no reasonable doubt here. This is murder and Robert McCoy did it. I'm asking you to convict him of three counts of first degree murder. Thank you.

THE COURT:

Mr. English, please.

(ENGLISH - CLOSING ARGUMENT)

MR. ENGLISH:

When we were picking a jury we all agreed that in these cases, capital murder cases, the facts would be so horrendous that they would challenge who we are; that they would challenge our humanity and they would go to the very core of what we believe as a community, as families, as a society. There are three victims in this case and our heart cries out to them as it should. And Mr. Marvin and the victims' family is here in court today looking for justice. That's what Mr. Marvin's job is to represent you and me and this State and the victims in this case because the law requires -- We require as a society that they receive justice. Civil society is too fragile to demand anything less. But we are a unique country. We have taken that word justice further than any country in the history of the world. And we add words to it that says "and justice for all". And justice for all. I told you when I stood in front of you that the stakes were too high, the loss was too great, that this process that we have put in place demanded that I stand in front of you and told you that after you saw the evidence in this case no reasonable person could come to any other conclusion than Robert McCoy was the cause of these people's deaths. So, I took that burden off of Mr. Marvin. I took that burden off of you. And the evidence said what Mr. Marvin said it was going to be and it said what I told you it was going to be. But I told you all something also. I told you, listen, I had to talk to you in language we could understand. Robert McCoy is crazy. He's delusioned. He's paranoid. He's wracked by conspiracy. And justice cries out and must be demanded for Christine Colston and Willie Young and young Gregory. But in this country, this great

country of ours, we went a step further. We said and justice for all. And let me tell you that's tough. That's tough. That's tough to live up to. That's a tough ideal to live up to. When I was giving you hypotheticals earlier in this process of some of the most vicious and inhumane crimes that a human being could inflict upon the other, you answered and we all made a promise, but we have to listen to the evidence and we have to apply the law. There is no way you can sit in this courtroom and listen to this evidence and not be emotional. There's no way you can sit in this courtroom and look at the autopsy reports of young Gregory Colston and not weep. My heart weeps for him. My heart weeps for Willie Young. My heart weeps for Christine Colston. All of us do. But I told you, and we agreed, you've got the tough part of this deal because the law requires you to put aside emotions, passion and prejudice and apply the evidence. We -- we agreed there's a reason we just don't take an individual out and shoot him or cut their hands off or cut their heads off. We, as a society, demand that twelve of our peers sit in this room, wrestle with the ugliness and apply the law. The judge is going to read you some instructions and they're going to say you are not to be influenced by sympathy, passion, prejudice or public opinion. You are expected to reach a just verdict in this case. From the moment I stood up in front of you this case was never about whether or not Robert McCoy was guilty or not guilty. I'm his defense lawyer. I told you this case was about whether or not Robert McCoy has the specific intent to commit first degree murder. Yes, the law says if he kills three or more people. That's there. That's evident. There's no argument about that. But the law requires does he have the specific intent. Ladies and gentlemen, Robert McCoy is so defective emotionally. He is so defective mentally. You -- you saw him on the stand. Robert

McCoy doesn't have the mental capacity to form a specific intent. As horrendous as the crimes were -- Mr. Marvin says the motive, the motive, the motive. No evidence was put on why he killed those people. No evidence was put on that he had any malice toward them or he had ever threatened them. The truth of it is we don't know why he killed those three people. But the law requires that you have specific intent. And the law requires that we apply the evidence and the facts of this case. And the law requires that no matter how repulsive we find Robert McCoy's acts, the law requires that you put your emotion aside and you apply the law and the facts. Robert McCoy believes that Detective Humphrey and the Idaho Police Department and Schuyler Marvin and everybody else is out to get him. Robert McCoy has looked at this evidence, sits in this room -- This is the not the first time he's seen that evidence. And Robert McCoy is so emotionally and mentally defective he believes that he was in Houston, Texas, when the evidence is overwhelming that he was in Bossier City. He believes that Sharon Moore lied against -- on him. He believes that Gayle Houston is lying. He believes that the Idaho Police Department called Detective Humphrey and said we got that boy. What you want us to do? And Detective Humphrey said plant a gun on him. He believes that the Bossier Parish Police Department -- he exposed them for drugs. You listen to him. He believes it. I've lived with this man for three years. Believe me, he believes it. And as horrible as it is, you have to determine whether or not he had specific intent to commit three murders. And I submit to you that Robert McCoy is such a defective, pathetic figure, it's not there. This is a second degree murder case. Justice demands -- justice demands that Robert McCoy stand before us and atone for the murders of those individuals. And as much as we want to

run out of this courtroom and scream from this ugliness and want vengeance and want to inflict the worst kind of pain and misery we can on Robert McCoy, we live in a society that says and justice for all. We can't stop - You can't stop at Christine. You can't stop at Willie. You can't stop at young Gregory who didn't get to go to his prom, didn't get to meet the woman that he would spend the rest of his life with. As painful as that is, the law says you can't stop. You've got to apply justice to Robert McCoy. The reason why we are so great, the reason why we have the greatest civil society in the world is because twelve people from our community are required to put aside all the passion, the need for vengeance, the need for atonement, the need to bring somebody back and apply the facts. Specific intent. Specific intent. Did Robert McCoy have the specific intent to kill those people? We have no motive. We have no rhyme. We have no reason. It hasn't been put in here. Mr. McCoy (sic) can play the 911 tape because it retches at our heart and it is horrible, but it doesn't establish specific intent. This is a second degree murder case. As painful as it is, you have to judge this man on the stand and you have to judge his mind and his emotional state in making your decision. And if you find that Robert McCoy on that stand was paranoid, delusional, wrapped up in his own world, then I think you have to find that first degree murder is not appropriate; that second degree murder is appropriate and that Robert McCoy spend the rest of his natural life in jail. It ain't easy. None of us want to be here. None of us want to be here. And no one in this courtroom envies you. But you speak for us. You speak for society. You stand between the barbaric -barbarism. I say it to you, you keep our humanity. You keep our humanity as the law requires you to put all the human passions that we feel in this case aside and the law requires of you

that you have to apply the facts. And the facts are Robert McCoy's delusional, he's paranoid, he's suicidal. My Lord, the man tried to commit suicide by chewing his arm off. He's crazy. He could not have formed the specific intent to kill those people. He's incapable as painful as that may be; as much as we may want it. He's crazy. And that's -- It is what it is. I ask you, the law demands, society demands, this community demands that when you go back in that room put aside all that we feel, and you, as judges in this case, you apply the law. I believe that the facts of this case are that Robert McCoy doesn't have the specific intent to kill those people. He killed them. I never lied to you about that. I never lied to you and told you that the evidence wasn't going to be tough. I told you Robert McCoy was crazy. I didn't lie to you about that either because you got to see and you got to hear the sordid evidence. People who try to kill themselves five times, people who chew their arms off, people who stuff toilet tissue down their mouth -- down their throats, people who hang themselves, people who believe that the people who protect us, the FBI, the Bossier Parish Police Department, are all in a collusion to kill them, to get them, they're not with us. And justice for all. And justice for all. It's a tough one. It's a tough one to live up to. I ask you -that's my job in this -- to apply the facts of this case, to divorce yourself from the emotions and the passions and remember the individual that you saw on this stand under my questioning, not his questioning. Under my questioning. And that you reach a conclusion that he did not have the specific intent to kill these people; that he is guilty of second degree murder and that he should spend the rest of his natural life in jail. Thank you. Thank you for your time.

THE COURT:

Mr. Marvin, rebuttal, please.

MR. MARVIN:

Just briefly, Your Honor.

(MARVIN - REBUTTAL ARGUMENT)

MR. MARVIN:

Well, ladies and gentlemen, I want to say first of all Mr. English has done a good job. I'd be the first one to say he didn't have much to work with, but he did -- he's done a good job and he's argued exactly what I expected him to argue to you. But the problem with that is that you should come back with something less than first degree. The problem with that is -- let me back up just a bit. The responsive verdicts that Judge Cox will give you in a moment are guilty of first degree murder, guilty of second degree murder, guilty of manslaughter or not guilty. Okay. Now, this mental deficiency that Mr. English is arguing to you now that Mr. McCoy allegedly has is something that he's telling you that prevents him from forming specific intent and specific intent is required. Well, specific intent is -- in the instructions Judge Cox will give you in an minute is this: Specific intent is that state of mind which exists when the circumstances indicate that the offender actively desires the prohibited criminal consequences to follow his acts. And then it defines general intent. General intent is present when the defendant may not actively desire, but he knows or should know that the criminal consequences are reasonably certain to follow his actions. Some crimes require that you find the defendant had specific intent, while others require only general intent. Specific intent means you intended to do what you did. That's it. That's a fancy way of saying it, but that's what it is. And the problem with Mr. English's

argument if you carry it on out is -- And Judge Cox will tell you. He's going to define for you what's first degree murder and what's second degree murder and what's manslaughter, and finally, not -- you obviously know what not guilty means. The problem with that whole argument is second degree murder is a specific intent crime. It's not a general intent crime. Second degree murder is the killing of a human being when the offender has the specific intent to kill or inflict great bodily harm. The difference is more than one person dies at the same time. Second degree and first degree have the exact same definition. They're both specific intent crimes. So his argument to you just go in there and find him guilty of second degree and give him a life sentence and let's all go on down the road won't fit because second degree murder is a specific intent crime. So, go ahead and let's argue it all the way through. Let's go to manslaughter then. Just give him a manslaughter sentence. Manslaughter -- To convict him of manslaughter you must find that the defendant killed Willie Way -- Willie Ray Young and that the defendant had a specific intent to kill or inflict great bodily harm. There's the words, specific intent, in the definition of manslaughter; and that the killing was committed in sudden passion or heat of blood immediately caused by provocation -- Provocation, somebody provoked you into doing something -- sufficient to deprive an average person of his self-control and cool reflection. And in -- in the jury selection process some of y'all-- We brought up manslaughter. You come home and catch your spouse in bed with another person and lose it. You completely lose your cool reflection and you react, grab a gun and kill them. Kill your wife or husband. Something happened that provoked you into doing that. That will -- So you know that manslaughter won't fit because it's specific intent and there's no provocation

here. There's no evidence that any -- that Christine Colston provoked him into doing anything. There's no evidence that Willie Young provoked Robert into killing him. And there's no evidence that Greg did anything that provoked Robert to put that gun six to eighteen inches from his head and pull the trigger. There's no evidence of that at all. All right. So you've now kicked out second degree murder as an available verdict for you and you've now kicked out manslaughter. That's not available because it's specific intent and there's no provocation. You know what that leaves you? Not guilty. That's your only other responsive verdict. Go in the jury room and convict him of first degree murder three counts. Thank you.

THE COURT:

Ladies and gentlemen, this is the State of Louisiana versus Robert McCoy, Criminal Docket Number 163,572, Twenty-Sixth Judicial District Court, Bossier Parish, Louisiana. This is the charge to the jury.

* * *

Mr. English:

Yes.

The Court:

The jury has sent a question that they would like to see, in order, the videos of -- in order of Wal-Mart, the chase, arrest on August 4th, 2011. That would be Video S-1. The video from the Szyska car, Video 53, S-53, and Video -- which was S-75. And I would show that to them in the courtroom. Mr. Marvin, do you want to -- We've got to be able to play it. Do you have your computer available or --

Mr. Marvin:

Yeah.

The Court:

All right.

The Court:

Mr. English, any objection to that?

Mr. English:

No, Your Honor.

The Court:

All right. Do we have the videos up here or do you have them on the computer already?

Mr. Marvin:

We have all of them.

The Court:

All right. Is the screen up and ready? All right, making sure. We're going to S-1 first, which would be the first video, which would be the video form the Szyska car. Then we'll do the next video which would be the Wal-Mart video and then the arrest video in Idaho. All right. Are y'all ready to proceed, Mr. Marvin?

Mr. Marvin:

Hold on a minute. Let me make sure. We're ready.

The Court:

Is that at the beginning on that video?

Mr. Marvin:

Yes, sir.

The Court:

All right. All right, is the jury ready?

Mr. Marvin:

Your Honor, my secretary informed me that last video has to build so it takes it two or three, four minutes to, you know, load itself up before it will play. So there may be a delay in between the second and third.

The Court:

Is that agreeable, Mr. English?

Mr. English:

I – I object. It's agreeable, Judge. I just wanted to be disagreeable, but I –

The Court:

Thank you, sir. All right. Another request is to see the sketch of the apartment. We can place that on the -

-

Mr. Marvin:

That's just a document. They can take that in there with them.

The Court:

Was that a document that was –

Mr. Marvin:

Yeah.

The Court:

He put that on the projector?

Mr. Marvin:

Well, when I was questioning the witness I did, but I --

The Court:

I need to get you next to a microphone, Mr. Marvin, just to make sure --

Mr. Marvin:

But I offered the document itself into evidence --

The Court:

All right, sir.

Mr. Marvin:

-- with Sage Allen.

The Court:

I'm trying to find it on the --

Madam Clerk:

Forty.

The Court:

Forty. And it is a document?

Madam Clerk:

Yes, sir.

The Court:

All right.

Mr. Marvin:

Is it marked?

The Court:

It is marked as S-40. I was just trying to find it on my exhibit list. And they would be able to take that into deliberations.

Mr. English:

No objection, Your Honor.

The Court:

All right. Then I'll allow them to take it into deliberations. All right, are they ready?

Mr. Sheriff:

Yes, sir.

The Court:

All right. Bring them in, please.

Mr. Sheriff:

Please rise for the jury.

(JURY ESCORTED INTO COURTROOM)

Mr. Sheriff:

All jurors are present, Your Honor.

The Court:

Okay. You may be seated. All right, ladies and gentlemen, I received a question, "May we see, in order, the videos of Wal-Mart, chase, arrest?" And we will play those videos in the courtroom for you in the proper order which was the chase, Wal-Mart and then the arrest. So, we will play those videos. Then before you came in -- it said, "May we see the sketch of the apartment rooms?" And what we will do is allow you when you go back into deliberations take the sketch that was entered into evidence under S-40 into deliber-

ations with you at that time. So, at that time, I would ask that the video under S-1 be played, please.

(VIDEO S-1 PLAYED FOR THE JURY)

The Court:

Okay. Now, I would ask that the Wal-Mart video be played, please.

(VIDEO S-4 PLAYED FOR THE JURY)

EXCERPTS OF AUGUST 5, 2011 TRANSCRIPT RE SENTENCING PHASE OF TRIAL

* * *

MR. MARVIN:

I have, Your Honor, and I've given your clerk a couple of extra copies and Mr. English a copy.

THE COURT:

All right. And, Mr. English, you filed your mitigation statement, is that correct, sir?

MR. ENGLISH:

That's correct, Your Honor. And I have also given the clerk a copy and Mr. – the district attorney a copy.

THE COURT:

All right. Before I bring the jury in, ladies and gentlemen, I know that it will be an emotional day. Mr. McCoy, I know it's going to be an emotional day, sir.

I'm going to ask that you stay in your chair –

MR. McCOY:

I'm asking now, Your Honor, to be removed from the courtroom.

THE COURT:

I cannot do that under the law, Mr. McCoy, so I'm letting you know that ahead of time. I'm asking that you restrain yourself and stay in your chair, please, sir. And you are to be present according to the law.

MR. McCOY:

Yes, sir.

THE COURT:

All right. So I'm asking –

MR. McCOY:

But also, Your Honor, I'm – I'm –

THE COURT:

Mr. English –

MR. McCOY:

I want to make this clear on the record, Your Honor. Give me a minute, please.

THE COURT:

Mr. McCoy – Mr. McCoy

MR. MCCOY:

Your Honor, I have been totally –

THE COURT:

Mr. McCoy –

MR. McCOY:

– set up in this matter, Your Honor. Mr. English has piss-poorly represented me.

THE COURT:

Mr. McCoy, before you –

MR. McCOY:

Mr. English has not did anything –

THE COURT:

All right.

MR. McCOY:

– Judge Cox, to vindicate my innocence. Y'all – y'all are railroading me, Judge Cox. You know it.

They haven't done anything in my aspect. This is the first trial –

THE COURT:

Mr. McCoy, I'm trying to stop you at this time to advise you that you have the right to remain silent, you have the –

MR. McCOY:

And I understand.

THE COURT:

– right to not discuss any of this in front of the courtroom.

MR. McCOY:

I need to, Your Honor.

THE COURT:

This is being recorded.

MR. McCOY:

I need to, Your Honor.

THE COURT:

All right. Mr. McCoy, I understand your position. I have heard your position the whole time, sir. I understand your position. You were – you testified yesterday on your position.

MR. McCOY:

Yes, but Mr. English didn't subpoena any of my witnesses, Your Honor. That's a violation of the Sixth Amendment Right of my compulsory process, Your Honor, and you know it.

THE COURT:

Mr. McCoy.

MR. McCOY:

And then the things Mr. English said in this courtroom, Your Honor, those is grounds for excess of a mistrial. That -- The stuff Mr. English said shouldn't have never been said in this courtroom.

THE COURT:

Mr. McCoy, you'll have the right to appeal all of that, sir.

MR. McCOY:

Yeah, I've got a right to appeal and now they -they done maliciously convicted --

THE COURT:

Mr. McCoy --

MR. McCOY:

-- me of three counts of first degree murder, Judge Cox.

THE COURT:

All right.

MR. McCOY:

That's not justice. Where is my due process, Your Honor?

THE COURT:

Mr. McCoy --

MR. McCOY:

Where is my equal protection under the Fourteenth Amendment of the United States Constitution, Your Honor? It has been violated, Your Honor.

THE COURT:

All right.

MR. McCOY:

You know it has, Your Honor.

THE COURT:

Mr. McCoy, that has been noted for the record, sir. I understand that. But I am asking you during this part of the proceedings to restrain yourself, remain in your chair –

MR. McCOY:

I want to be excused, Your Honor.

THE COURT:

You cannot be excused according to the law. But if you leave that chair, sir, I will have you restrained in that chair. Do you understand that? Do you understand that, Mr. McCoy?

MR. McCOY:

I do, Your Honor.

THE COURT:

All right. So, remain in the chair and I am telling this courtroom that there will be no outbursts in this courtroom.

MR. McCOY:

Also, Your Honor, I know they probably talked to you. I want to skip these preliminaries, Your Honor. They've maliciously convicted me of three counts –

THE COURT:

No, sir, I have –

MR. McCOY:

– first degree murder.

THE COURT:

Mr. McCoy –

MR. McCOY:

I want to go on and get the death sentence, Your Honor, and go down to – go down to Angola and give this stuff back, Your Honor.

THE COURT:

Mr. –

MR. McCOY:

I – What are we going through these excess preliminaries –

THE COURT:

Mr. McCoy, I have –

MR. McCOY:

– for, Your Honor?

THE COURT:

Mr. McCoy, no one has talked to this Court. The jury has been sequestered this whole time and has not made any discussion of this.

MR. McCOY:

But how can I have a purpose with the defense, Your Honor –

THE COURT:

That is it, Mr. McCoy.

MR. McCOY:

– and I have had nothing to work with -

THE COURT:

Mr. McCoy –

MR. McCOY:

– here, Your Honor.

THE COURT:

Mr. McCoy, that is it for the day.

MR. McCOY:

That's it for the day, Your Honor.

THE COURT:

All right. Thank you, sir. All right, Mr. Marvin, ready to proceed, sir?

MR. MARVIN:

Yes, sir.

THE COURT:

Mr. English, ready to proceed, sir?

MR. ENGLISH:

Ready to proceed, Your Honor.

THE COURT:

All right.

MR. MARVIN:

Are you going to sequester the witnesses before or after –

THE COURT:

Yes, sir. No, I'll do it when I have the jury in the courtroom.

MR. MARVIN:

That's fine.

* * *

YOLANDA COLSTON

**Called as a witness
by counsel for the State,
who, after having been duly sworn,
was examined and testified as follows:**

DIRECT EXAMINATION

BY MR. MARVIN:

Q Ms. Colston, will you please state your name and if you could spell your last name, please.

A Yolanda Colston, C-o-l-s-t-o-n.

Q Yolanda, you were married to Robert McCoy?

A Yes.

Q When were y'all married? What year?

A Uh, I'm thinking in probably '05 or '06. I'm not sure. I'm not really sure.

Q '05 or '06 or what?

A I said probably in '05 or '06. I'm not really sure.

Q Where were you married? In Caddo Parish or –

A Caddo Parish, yes.

Q All right. Ms. Colston, Gregory is your son or was your son?

A Yes. Yes, he's still my son.

Q And who is Gregory's father?

A His name is Lee Gregory Johnson.

Q Okay. Now, when did you meet Robert McCoy?

A I met Robert – it was at a gym, like a work-out, over there off of Bert Kouns.

Q When?

A Oh, gosh, it's been so long. I don't know.

Q Okay. Let me ask you this. How old was Gregory when you and Robert began seeing each other –

A He was –

Q – as a couple?

A He was just fixing to turn fifteen almost, I think. He was fixing to turn at least fifteen.

Q At least fifteen?

A I think so.

Q Okay. Let me push that a little bit closer to you. Ms. Colston, did Robert and your son, Gregory, get along?

A No. Robert always had a vendetta against my son because I'm going to always choose my son over him. As a mother we've got to protect our children.

Q Okay. Did he – But did he and Gregory get along on a daily basis? I mean –

A They got along, you know. Greg kind of looked up to him because Greg had never really just had a father figure.

Q Okay. So y'all were able to sit down and eat supper and meals together, things like that?

A When he was there. When Robert was there.

Q Okay.

A Robert wasn't – I mean he'll come home maybe a week and then he will leave for like two or three weeks without even calling or saying anything.

Q Okay. Now, Yolanda, in the spring of '08 things had gotten bad between you and Robert?

A Uh-huh. Yes.

Q Okay. And there was an incident which I believe you ended up talking to Detective Humphrey?

A Yes.

Q Do you know who I'm talking about?

A Yes.

Q An incident occurred between you and Robert?

A Uh-huh. Yes.

Q Where did that happen at? What location?

A It was in Bossier. It was at my house. Robert had already – had broken into my house.

Q You and Robert had separated?

A Yes, we had separated.

Q And had you moved from the residence where you and he lived together or did he move to another location?

A No, I moved.

Q Okay. Did Gregory go with you then?

A Of course, yes. Yes.

Q Okay. And so, what happened – you said he had broken in your house. Tell us what happened.

A He had – he had broken into my house and I had our daughter with us. And as I walked in the house Robert was in – it's a den where's there's sliding doors. He was in there hiding. And when he came out I'm thinking like he was going to come and say, look, I'm sorry. I apologize for what – what's been going on between us. But he had a knife in his hand. And as he had that knife, that's when he came towards me and took me to the back room and pressed the knife against my throat and said that I'm going to kill you and I'm going to kill myself. During that time my – my daughter was right beside me tugging, you know, on my – you know, my leg while he had me laid down on the bed.

Q Okay. Let me back you up just a minute. Your daughter?

A Yes.

Q What's her name?

A Anna.

Q Okay. She is your and Robert's daughter?

A Yes.

Q And what's her birthday?

A Her birthday is October the 7th, '06.

Q Okay. So she's two years old approximately when this is happening?

A She's – she was turning two. She was turning –

Q Or, yeah, a year and a half old?

A Yeah.

Q A year and a half to two?

A Yes.

Q Okay. And you said she was tugging at your –

A She was tugging at my leg, you know. She didn't – you know, she's small. She didn't know what was going on. At that time Robert had me placed down – I can't remember how, but I know that I could not get up. I couldn't get up at all. And he still had the knife to my throat.

Q Okay. And so, what happened?

A I asked him what are you doing, you know, like that. And so, he like, you're not fixing to embarrass me. I'm like, embarrass you. He's like – he just kept saying you're not fixing to embarrass me, you know. And so, I'm like, Robert, this is not you. This is not of God. This is not you. Please do not do this. I pleaded with him not to do this.

Q How long did all this take?

MR. ENGLISH:

Excuse me, Your Honor. I'm going to make an objection. Can we ask the jury to –

THE COURT:

All right. All rise, please.

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED OUT OF COURTROOM)

THE COURT:

All right, Mr. English.

MR. ENGLISH:

Your Honor, I make an objection to all of this testimony. I ask that it be stricken. Mr. – Mr. – The State could have put this evidence on at the guilt phase They're attempting now – This is – We are now, Your Honor, in the penalty phase of this case. This is evidence that should have been put on at the guilt phase that was not put on, Your Honor. We do not have an opportunity to respond to it at this particular time. We are now in the penalty phase for which there are very strict rules, Your Honor, as to what an individual can testify to. I think that this goes beyond the penalty phase of what we're now going back and attempting to do what should have been done at the guilt phase by putting this evidence on, Your Honor. It's not relevant to this particular case or where we're at right now.

THE COURT:

All right, Mr. Marvin.

MR. MARVIN:

Your Honor, first of all, it was put on in the guilt phase. The affidavit – well the aggravated battery warrant was in evidence as Exhibit – It should be around the first twenty I would say.

MR. ENGLISH:

Your Honor, I stipulate that a warrant was put into the record and Officer Humphrey – Humphrey had referenced it, but this is going into specific details of prior –

MR. MARVIN:

5-71 – S-71. 8-71.

MADAM CLERK:

Seventy-one.

MR. MARVIN:

S-71. Your Honor, Exhibit – State's Exhibit 71 is a warrant for the aggravated battery under the Domestic Violence Act and it was offered into evidence in connection with Detective Humphrey's testimony from the State.

MR. ENGLISH:

And – and, Your Honor, this is prior criminal acts that they are talking about here today. You can – you can – you can inform the jury – Because we took this to the Second Circuit – you can inform the jury that this crime was committed, but you cannot go into details of prior criminal acts in a – in a trial. It is – it is not – it is not permissible under the laws of Louisiana. The State is attempting to bring in prior criminal acts. We took this to the Second Circuit. The District Attorney certainly has the right to say Robert McCoy – that it's relevant to the fact that Robert McCoy – a warrant was issued against Robert McCoy for aggravated battery. But to allow this witness to go into specific details of that event is a violation of Mr. McCoy's rights. You cannot go into the details of a prior criminal act, Your Honor. The State has already put it on the record. It's in there. And, quite frankly, Your Honor, I should have objected earlier. That testimony should be stricken and they should be prevented from going any further into this testimony.

THE COURT:

All right, Mr. Marvin, your response, please.

MR. MARVIN:

Your Honor, we filed a Notice of Intent of Other Crimes Evidence a long time ago. And we've argued that. We had a hearing here. I don't believe this is a

matter that did go to the Court – Second Circuit of Appeal, but it was ruled admissible for the purposes of allowing the tryer of facts to know why Mr. McCoy was at that residence and what motivation he had for being there and why the police were looking for him and why he was named as a suspect immediately after discovery of the bodies. But at this stage of the proceedings, Your Honor, this victim is allowed to – to discuss what has transpired between her and this defendant and how this has affected her. This is one of two, and the only two events, that I'm going to go into. The other is actually the murder obviously. But she is allowed under the law to tell the jury what happened between her and the defendant and how it's affected her life. That's what this – that's what the whole guilt – I mean penalty phase is about. So, we submit that it's directly relevant. I don't intend on just harping on this agg battery incident much longer, but it's before the jury. The jury already knows about it.

MR. ENGLISH:

Your Honor, it's before the jury. Clearly, we went to the Second Circuit and the Second Circuit says he has the right – it was relevant to bring it to the jury as to – as to what Mr. McCoy's motivation was in going into that house. That has already been established. But this is a prior criminal act. What Mr. Marvin is attempting to do, Your Honor – and the law is clear he can – he can raise that issue, he can inform the – he can inform the Court that Mr. McCoy – a warrant was issued against Mr. McCoy for aggravated battery against Ms. Colston. But to allow Ms. Colston to testify in graphic detail what the event is, is a violation – it is a violation of the Rules of Evidence and – and it impugns Mr. McCoy's right to a fair trial. This is a prior criminal act. You cannot go into those specific details. You can

alert the jury that it took place. You can alert the jury that he already has that in the record. He clearly has it in the record now which, Your Honor, which actually that testimony should be struck, but he cannot go into the specific details of – of – of, by the way, what is an allegation, Your Honor, that was never put in front of a courtroom, never put in front of a tryer of fact to determine as to whether or not those allegations were true or not. That is what the danger is and that's why he cannot go into that testimony.

THE COURT:

All right. I will take five minutes – ten minutes to take this under advisement and I need to go upstairs and look at another issue at this time, so we will be in recess for ten minutes.

MR. SHERIFF:

Court's in recess for ten minutes.

(COURT RECESSES)

(COURT RECONVENES)

THE COURT:

All right. I need everyone to come to order, please.

MR. SHERIFF:

You may be seated. Court is in session.

THE COURT:

All right. During the recess I had several issues that arose. Mr. Marvin, you're present and ready to proceed, sir?

MR. MARVIN:

Yes, sir.

THE COURT:

Mr. English, you're present and ready to proceed?

MR. ENGLISH:

Yes, Your Honor.

THE COURT:

And, Mr. McCoy is present with you?

MR. ENGLISH:

Yes, Your Honor.

THE COURT:

All right. Ladies and gentlemen, I am going to address the courtroom at this time. I understand that this is a highly emotional case and issue. I am going to direct that persons do not talk to each other in this courtroom or outside of this courtroom or try to question each other about the case in this courtroom. I am not addressing any one person, but the other side of it is if I hear of any other disruption out from the audience I'll either remove that person from this audience or I will take other appropriate actions to make sure that the integrity of this trial is preserved. So, I have made my warning on the record and I do not want to have to address this issue in the future. As far as the objection made by Mr. English, State of Louisiana versus Adam Comeaux, C-o-m-e-a-u-x, it is cited under 699 So.2d 16. It overrules State of Louisiana versus Bourque, B-o-u-r-q-u-e, which is found at 622 So.2d 198. This is a July 1st, 1997, opinion by the Louisiana Supreme Court. It states that, "Evidence that established the defendant in the recent past has engaged in criminal conduct involving violence to the person is highly probative of the defendant's character and propensities. Such evidence generally would not inject an

arbitrary factor into a capital sentencing hearing, especially when the conduct involves the same or similar crime committed in a similar manner." The case goes on to state that, "There is a point that it may reach sheer magnitude and details of the evidence can be excluded because of its cumulative or repetitive nature and that would be in the discretion of the judge." But at this time it has not reached the magnitude of that and, therefore, I will overrule the objection –

MR. MARVIN:

Thank you, Your Honor.

THE COURT:

– based on that case. And I will enter this case into the record.

(COPY OF CASE FILED INTO THE RECORD)

MR. ENGLISH:

Your Honor, may I – may I just make – just for the record, so I can preserve this record for appellate purposes, I am going to again ask the Court not to allow that testimony because those are mere allegations that have been made against Mr. McCoy. They've never been tried and put in front of a tryer of fact. Under the under the – under the – They have never been put under a tryer of fact. These are mere allegations against Mr. McCoy. What the Court is now putting me in a position of doing is now trying this evidence because Ms. Yolanda Colston is such a key figure in this case. She's the -- she's the mother of a victim. She's the daughter of a victim. She's the step-daughter of a victim. This Court now puts me in a position, Your Honor, of having to now get up here and cross-examine a witness on the – on the facts of this case or to – or to bring other witnesses into this case to refute those allegations. I think

the law is clear the State does have a right to bring in prior conduct. I think that the State can bring in that prior conduct, which it has already done without going into specific allegations – And these are allegations, by the way, Judge. That's what they are. They're allegations. This is not – this is not where this case was tried in front of a judge and a jury and you are now reciting facts that were tested in a forum. You are now allowing an individual to come into this court in a capital – penalty phase of a capital murder proceeding and make allegations, untested allegations. In fact, Your Honor, I believe that what is – that – that – that – that given who Ms. Colston is in this case and given her central role in it, Your Honor, I now move for a mistrial in this case, Judge.

(DEFENSE MAKES MOTION FOR MISTRIAL)

THE COURT:

Mr. English, I will recite again the Louisiana Supreme Court case of State versus Comeaux. "Evidence that establishes the defendant in the recent past has engaged in criminal conduct involving violence to the person is highly probative of the defendant's character and propensities. Such evidence generally would not inject an arbitrary factor into a capital sentencing hearing, especially when the conduct involves the same or similar crime committed in a similar manner." I will make my ruling, Mr. English. I deny the mistrial. And I will state that this case is involved. It was found under other crimes evidence under 404B. It directly states under 404B this case. It overrules the State versus Bourque and I am relying on this case. If it become cumulative – Mr. Marvin is – has the ability to state what has happened to the victim as far as violence. But if he becomes cumulative or in magnitude, then the

Court has the right to shut it down. And the Court will note your objection to this for the record.

(MOTION FOR MISTRIAL - DENIED)

(OBJECTION TO COURT'S RULING NOTED FOR THE RECORD)

MR. ENGLISH:

I just want to respectfully state that Ms. Colston is not the victim in this case.

THE COURT:

Mr. English, I think that she stated that she was a victim –

MR. ENGLISH:

No, no, no, no. No, Your Honor, Ms. Colston is –

THE COURT:

The violence –

MR. ENGLISH:

The point is, Your Honor, Ms. Colston is not the victim that Mr. McCoy is on trial for, for having committed a crime against.

THE COURT:

Mr. English –

MR. ENGLISH:

She is not the victim, Your Honor.

THE COURT:

Mr. English, the evidence of violence to a person is probative. There was other crimes evidence which has already been allowed by the Court which you have stated has been taken to the Second Circuit, which the

Second Circuit did not overrule this Court's determination, and that crime has been placed before the jury at this point in time. Mr. Marvin, if you can move on from that point, I would instruct you to move on from that point and let's move forward, please. But I will note that the objection is overruled based on State versus Comeaux.

MR. MARVIN:

Okay.

THE COURT:

And I will enter State versus Comeaux into the record. All right, all rise for the jury, please.

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED INTO COURTROOM)

MR. SHERIFF:

All jurors are present, Your Honor.

THE COURT:

All right. You may be seated. Mr. Marvin.

MR. MARVIN:

All right.

DIRECT EXAMINATION OF YOLANDA COLSTON (CONTINUED)

Q Ms. Colston, when we broke a moment ago you had described for the jury an incident between you and Robert?

A Yes.

Q Had – had y'all filed divorce papers at that time?

A No.

Q Okay. And that incident led to a warrant from Detective Humphrey being issued for Robert, correct?

A Yes.

Q And are you familiar with the warrant? Have you ever seen it?

A No, I –

Q Okay. Did you know they were looking for him to arrest him?

A Oh, yes. Yes.

Q Okay. I'm going to show you what's been marked as State's Exhibit 71. It was offered into the trial in this matter. Does that generally look like the incident that you described? I'll represent to you that that's a – that's a warrant?

A Yes. Yes.

Q Okay. Now, Ms. Colston, after Greg and your mother and your step-father – How long had your mother and step-father been married?

A I think at least over two years, maybe a little bit more.

Q Okay. Did you get along with your step-father, Mr. Young?

A Oh, yes. Yes.

Q Okay. After their deaths who went to the funeral home and picked out the caskets?

A I'm thinking my sister, my brother and my cousin did because –

Q Okay.

A – I was under police protection, so I didn't – I couldn't do anything.

Q Okay. Their funeral was before Mr. McCoy was apprehended?

A I don't know.

Q You're not sure. Okay. And I understand Greg's birthday was yesterday?

A Yes, sir.

Q Was it a hard day for you?

A It was because he turned twenty-one yesterday. And that's considering him as a grown man and I ain't – I haven't – I missed out on that because when I went to the grave site the only thing that I seen was just dirt and grass and don't nobody – no parent want to see that. No parent.

Q Okay.

A And that's all I have.

Q How old was your mother?

A Huh?

Q How old was your mother?

A She – Her birthday is this month too, August the 11th. And she will be 59.

Q Okay. Ms. Colston, how else has this matter affected you?

A It changed my life because things that me and my mom and Willie and them do as a family I can't get

that back. My son, I didn't get a chance to see him graduate and that's a proud thing for a mother, you know.

Q Uh-huh .

A And it was always – before I got married to Robert it was just me and my son and so we did everything together. He was a sweet boy. He was very smart. He – he done what he was told to do. I had no problem out of him. He made great grades. I had no problem out of him. He was a good boy. And I loved my son. And I just feel – And I know deep in my heart he knew that. He knew it and he took my baby away from me.

Q Okay. Did Greg have plans to go to college?

A Yes.

Q Were you going to help him?

A Yes.

Q How?

A Everything I could. I could take on two jobs. I mean he was – He – he's my first and I wanted to see him go to college. And I know he wanted to make his mama proud.

Q Okay. Anything else you want to tell us, Ms. Colston?

A My mother, she was a strong woman. She'll give you her last, her last. I'm the baby of the family and I was always with my mother. We worked together. We did everything together. My dad - My stepdad, Willie Young, he was more like my dad than my real dad. He loved me. He always told me loved me. He would always be there for me. He took care of me.

Q And, Ms. Colston, you heard that 911 tape?

A Yes.

Q Do you recognize your mother's voice?

A Yes.

THE COURT:

That's all the questions I have. He may have some questions for you.

MR. ENGLISH:

No questions, Your Honor.

THE COURT:

You can step down.

THE COURT:

All right, Ms. Colston – Ms. Colston?

MS. COLSTON:

Yes.

THE COURT:

Ma'am, you're still under the rule at this time. Just do not discuss this case with anyone, please,

* * *

DR. MARK VIGEN

Called as a witness
by counsel for the Defense,
who, after being duly sworn,
did testify as follows:

DIRECT EXAMINATION

BY MR, ENGLISH:

Q Good morning, Dr. Vigen.

A Good morning, sir.

Q Dr. Vigen, I just want to – although you've been stipulated, I just want to talk a little bit about your credentials and your resume, okay.

A Yes, sir.

Q And you have a Ph.D. in what?

A In Clinical Psychology.

Q And how long have you been a clinical psychologist?

A Since 1976.

Q And you are also a teacher, correct?

A I was a teacher, yes.

Q You were a teacher. And you had a student in your class some years ago?

A Many years ago I had a student, yes.

Q And who was that student?

A Larry English.

Q Okay. Did I turn out better than what you hoped for?

A You turned out way better that what I'd hoped for.

Q All right. And you – you have worked and you have a particular area of expertise in capital cases, correct?

A Yes.

Q How many capital cases have you handled in your career?

A I've evaluated about 150 men who have been charged with first degree murder and testified in 39 capital murder cases.

Q And you – you are often asked to come and interview and become involved with individuals who you may not have dealt with at the guilt phase or the penalty phase in that trial, but you deal with them on the appellate phase, correct?

A Yes.

Q Do you have an idea of how many of those cases you've been involved in?

A These would be like post-conviction cases?

Q Yes.

A Probably ten to twelve.

Q Okay. And you've published a number of articles as I looked in your resume in this area, correct?

A Yes.

Q And I want to just talk with you about a few of them. One is "Without Appointed Counsel in a Capital Post-Conviction Proceeding".

A Yes.

Q You published that in 1999, correct?

A Yes.

Q And one you published in 2002, "Death Row Inmate Character Adjustment and Confinement: A Critical Review of the Literature", correct?

A Yes. And "Behavioral Science and the Law".

Q And "Behavioral Science and the Law"?

A Yes, sir.

Q And in the Journal of Criminal Justice you published in 2010, "Inmate Homicides, Killers, Victims, Motives and Circumstances", correct?

A Yes.

Q And in the Criminal Justice Behavior you published "Correlates and Actuarial Models of Assaultive Prison Misconduct Among Violence-Predicted Capital Offenders"?

A Yes.

Q That was in 2010. And in 2010, you published "Life and Death in the Lone Star State: Three Decades of Violent Predictions by Capital Juries in the Behavioral Science and the Law", correct?

A Correct.

Q And, finally, in 2011, recently, you published "Serious Assaults on Prison Staff: A Descriptive Analysis on Journal of Criminal Justice", correct?

A Yes.

Q Can you tell me briefly your interests and what motivated you to publish these articles?

A I've always done prison work starting when I was a graduate student at the University of Michigan. And there was an attorney in New Orleans who was representing some Mississippi death row inmates asking that they be given attorneys to represent them while they were on death row and he asked myself and I asked one of my colleagues and we went and researched their characteristics and their competency to represent themselves in the appellate process in Mis-

sissippi. And so that led to us being able to evaluate about forty-five or fifty death row inmates in Parchman, Mississippi, where the death row – the death row is housed. And that research led to the State of Mississippi deciding that inmates on death row deserved to have representation by lawyers. And then I was asked to do some cases in Dallas, Texas. And in Texas the issue of future dangerousness in a prison is an important part of the law. And so we began to study more carefully whether we could predict which inmates would be a danger in the prison if they were sentenced to a life – sentenced to life or sentenced to death. So, we were interested in what tools could we bring to understand who would be violent in prison and who was more at risk or who was lower risk. And so that's how I got involved in – in that research.

Q And do you know Mr. Robert McCoy?

A Yes.

Q And were you assigned to Mr. Robert McCoy to make a determination as to whether or not he was mentally competent to stand trial in this case?

A Yes.

Q And did you evaluate him?

A Yes.

Q And what was your clinical diagnosis? If I used the right term there.

A I don't think we made a diagnosis or I made a diagnosis at that time. But my findings were that he was – I reported to the Court. I didn't make the findings. The Court makes the findings.

Q Sure. Obviously.

A But we reported, I and another doctor, reported to the Court that it was our opinion that he was not so mentally impaired that he would not be able to stand trial. And we found no evidence to suggest that he had a mental illness that would interrupt his ability to know right from wrong regarding the – the murders that he's been convicted of. So the Court then, independently of us, decided that he was competent to proceed to trial and the Court decided that – that he was not, I guess, insane or whatever. And so that brought us to this hearing or to this trial.

Q And when you're asked to determine whether or not an individual is mentally competent to understand – be able to assist his lawyers in the defense and to be able to understand right and long – right and wrong and to understand what proceedings are going around – going on around him, is that correct?

A Yes.

Q And outside of that – And I know you're looking for very narrow issues at that time. At that time did you make any other findings – did you make any additional findings about Mr. McCoy's mental or emotional state?

A No, we –

Q Okay.

A We just spoke to the issue of competency and sanity.

Q But you were subsequently asked to – in preparation for this trial to meet with Mr. McCoy and evaluate him, is that correct?

A Yes.

Q And can you tell me approximately how many interviews did you do with Mr. McCoy? How many hours of interviews did you do?

A I and my staff, including a psychiatrist that works on my staff and a social worker that works on my team – We kind of have a team approach to these evaluations – together we spent seventeen hours interviewing Mr. McCoy.

Q And how many collateral hours of interview that you did? And explain to the jury what collateral hours are.

A Collateral interviews are interviews with people that he asked us to interview and – family members and people that -former employers, people that knew him. And we spent thirteen hours interviewing other people: A Shreveport City Marshal, Shreveport City police officer, Bossier Parish Sheriff's office officer and department administrators, pastors, his parents, Caddo Parish deputies.

Q Did you have to review documents in this case?

A Yes.

Q And can you estimate how many documents you reviewed?

A Oh, gosh, three –

Q Let me ask you a different question. You – you reviewed the whole case file in this case?

A Yes. We reviewed everything we could find to review, yes.

Q You reviewed all the police reports, any evidence, any documents that – that the lawyers suggest-

ed to you, any documents that Mr. McCoy suggested to you? You looked at everything, correct?

A I think we had about three or four of these two and a half to three-inch binders full of documents.

Q And is – isn't it safe – is it safe to say that what you -what you try to do so – in order to make a – an accurate evaluation of the individual is that you try to look at that individual's whole life?

A Yes.

Q And did you try to attempt that in Mr. McCoy's case? In this case?

A Yes.

Q Was there another doctor that worked with you?

A Yes.

Q Who was that?

A Dr. Patrick Sewell.

Q And what was his role?

A He was – accompanied me on two interviews with Mr. McCoy. Mr. McCoy is difficult to interview and assess, and so I asked Dr. Sewell to join me and he participated in two interviews with me.

Q Okay. And after conducting all of your interviews, document reviews, you made a finding or opinion as to – about Mr. McCoy, correct?

A Yes.

Q And could you tell the jury with specificity what your findings were?

A Yes. I made three findings, which I call three opinions. And the first is that Robert McCoy has a narcissistic personality disorder with anti-social features and paranoid features. And the second is that Robert McCoy has what we in – in psychology call an attachment disorder in which he sees himself as a loving man, partner, husband to women, sort of saving them from the evils of the world and all by using his encompassing love and then seeing them as evil when they do not comply fully with his expectations of them. And the third is that Robert McCoy transforms, rewrites, refabricates his view of himself and his view of reality in order to maintain his self image of himself.

Q Let's take the first one and – and can you educate those of us not in your field, including the lawyer standing here. Robert McCoy has a narcissistic personality disorder with anti-social features and paranoid features. Can you explain that for me, please?

A I'll try to explain it. It's – And if I get too wordy, please interrupt me, or if I say something that doesn't make sense. Narcissism is a – Well, it starts with – It comes out of Narcissist was a Greek – Greek mythology person, a created person in Greek mythology. And Narcissist was this beautiful young boy, young man, and he was very, very handsome. And one day he was -This is in the mythology. He's out in the – in his boat and he looks over into the water and he sees his reflection and he is so enamored with his reflection that he looks closer and closer and closer. He just loves his reflection. And he looks so closely that he falls into the water and drowns. And so a narcissist, somebody who has a narcissistic personality, they are – they're very – they have an inflated grandiose view of themselves such that they see themselves as very important, very powerful. And what they do is they mistakenly believe

that only their reality exists; that they and what they perceive is true; that they have the truth. And they are unwilling or unable or certainly deficient in their ability to see that other people have different points of view, different ideas, different feelings; that other people see things differently than they do and they're unable to consider that other people could have such views because only their view is accurate. Their view is the truth and anybody who has a different point of view is just – does not possess the truth. So, for example, if – if you saw Mr. English and me arguing and Mr. English clearly had a point of view, his point of view is Point A. My – mine is Point B. And we just disagreed on that. And you knew clearly that Mr. English knew my point of view. He understood B, but he just disagreed with me and maintained his view and that's A. And then when Mr. English goes away, I say to you, well, I – I just can't understand what's wrong with Mr. English. He's just not smart or I didn't explain myself well enough, because if I had explained my point of view clearly enough, or if he was smart enough, he would clearly see that I'm right because I have the total truth and he's wrong. And so narcissism is a – is a personality disorder. And as you can imagine it interrupts, interferes with interpersonal relationships. It's very, very hard to have a quality relationship with someone who has a narcissistic personality disorder because there is no room for you or me in the relationship with them because we cannot have different ideas, different feelings, different perceptions, different points of view.

Q And in your review of Mr. McCoy's life, were you able to determine whether or not Mr. McCoy had a pattern with women?

A Yes.

Q Could you explain?

A Well, that goes to my second opinion. I think he has an attachment disorder with – And what I mean by that is that he's unable – more than likely than not because of the personality disorder he cannot empathize or consider the other person's point of view so he doesn't attach. He's had no close attachments in his life that I can tell. And I think the majority of his problems in life began with very, very poor relationships with women. And he has developed this idea of himself that he is a very good man, a very loving man and somehow women who have been corrupted by society he is on a mission to kind of save them and – but when he over meshes or over controls they rebel because they're individual people who are competent themselves and then he begins to have conflict with them and even becomes suspicious of their motives, their behaviors, accuse them and – and be angry at them.

Q Isn't it common that men who suffer from the diagnosis that you just said of Mr. McCoy they become – it is – they become suspicious that the woman in their life are having – is having affairs?

A Yes, frequently.

Q And the really, really extreme aspect of it is, for lack of –from a layman standpoint is if I can't have you nobody else can?

A Well, I don't think you have to be narcissistic to arrive at that level of pathology. But I mean that's certainly possible with narcissism.

Q Okay. I want to go back to your – your first diagnosis and the narcissism. You indicated that it's antisocial features and paranoid features. Let's talk about the paranoid features.

A Yes, sir.

Q Were you able to evaluate – Did you see Mr. McCoy testify yesterday?

A Yes.

Q I'm not a psychologist. I'm a lawyer. I saw a paranoid, delusional individual who thought that everybody was in conspiracy to kill him. And he certainly convinced me that he believes it. What did you see?

A He certainly is convinced and he is convincing in his power and his energy that he puts into portraying his view of the way things are. I think he has paranoid features. And this may be too technical and it may bore you. But I mean in psychology and in medicine what we try to do is we have differential diagnoses, so we have to consider what are the possibilities here when you see what you all saw. Well, I consider the possibility does he have paranoid schizophrenia. And I ruled that out because he does not have delusions – or hallucinations. His thinking can be delusional at times, but he doesn't hallucinate and his thinking is not disorganized. So that's not considered. There's something called the paranoid personality – or the paranoid delusional disorder. And this is if you imagine a pie chart when 7/8ths of the pie the person's life is intact and they're doing well and only l/8th of the pie there's some little aspect of their lives -the paranoid delusional is where – where something just doesn't fit. Let me give you an example. I had a patient at the hospital and he – he said he's getting married. And I said, well, how do you know you're getting married and he said, well – or I said who are you going to marry and he said, well, that woman across the -the – the dayroom. And I said, well, have you asked her? No. Does she know you're going to marry her? No. Well, how do you know that

you're going to marry her? Well, you see, she's wearing a green dress and green means go, and, therefore, the marriage is on. And so it's just the – it's usually the paranoid disorder is a sliver of paranoia, but the rest of the life is fine. Then there's the paranoid personality disorder that's another disorder. And paranoid personality disorders are always looking for clues to why something – Reality is out here and they think it's a clue and they're looking for what does it – what is the meaning behind the clue. And he doesn't really fit that either. So, I've – you know, I was considering these – these different possibilities, the paranoid schizophrenia, the paranoid delusional disorder and the paranoid personality disorder and he really doesn't – he doesn't really meet for any of those. And, yes, he does have this conspiracy theory that everyone, you and I, and the judge, and the lawyer – especially Mr. Marvin and Mr. Humphrey, that all these people are conspiring against him and to what degree he – I believe he clearly believes that and – But it's so pervasive that it defies the paranoid delusional disorder. It's not schizophrenia. It's way more than paranoid personality disorder. And I think it's part of his fabricating the world the way he wants to see it and I think it's narcissism.

Q Let's talk about that and then I want to – Let's talk about the third one where you indicate he transforms, rewrites, refabricates his view of himself in reality in maintenance of his self image. Can you explain that one?

A Yes. Can I give practical examples?

Q Yes, you could – yes – whatever you have to do.

A Mr. McCoy, I think, clearly understands my role in mitigation and not my role to prove or disprove this case. My job is – was not to go out and prove or

bring evidence that he was guilty or bring evidence that he was not guilty. That's not what a psychologist does. And yet he wanted us because you were doing such an inadequate job to – you and his previous lawyers – that he wanted me and our staff, or my team, to go out and interview other people and he would tell me what these people would say. So, I decided I would go and interview a number of people to – to see what they would say. And let me give you just an example. Virgil Robertson is a Caddo Parish Sheriff's deputy. A man I've known a long time. I see him at the courthouse regularly. He's an excellent deputy. And Robert told me that he and Mr. Virgil Robertson were cousins and that Virgil knew when Robert left town and where Robert was and that Virgil told Robert that Yolanda was having an affair and that Virgil told him to leave town. And all of this occurred after Mr. McCoy said that his home was broken into at 5705 East Texas, Unit 16, by the Bossier Sheriff's and Police Department; one of the two. I'm not sure. So, I interviewed Mr. Robertson, Virgil Robertson, and he said that indeed he does know Mr. McCoy. He said indeed they do – they are cousins on their father's side and that Mr. – or Deputy Robinson knew Spartacus, his brother, and so – But he said that he – and he said that Mr. McCoy did call him and told him that he was out of town, but he did not say that in any way he knew where Mr. McCoy was. He did not know anything about Yolanda. He didn't know anything about Yolanda having affairs. And he certainly did not tell Mr. McCoy to leave town. So, I think – And Mr. McCoy had come into contact with Deputy Robertson at the Caddo Parish Courthouse for various things and so I think what he does is he takes, you know, an incident or an individual and he brings that individual into his reality and then puts a meaning onto them such that they are potential witnesses to support

his view. The only problem is they don't support his view.

Q Does Mr. McCoy – When – when Mr. McCoy was telling you about this cousin and what his cousin was going to say, do you believe that Mr. McCoy believes that?

A The best way, Mr. English, I can say it is he's emphatic, he's persuasive. And I don't have a way to measure – I mean I -I want to believe it, but I don't have a way to actually measure to what extent he believes. I think he believes it to answer your question. But to be honest with the jury, I don't have a scientific way to say I'm absolutely sure he believes it. I think he believes it.

Q Did Mr. McCoy ever talk to you about Rice University?

A Yes.

Q What did – what did he tell you?

A He said that he graduated from Rice University.

Q And what did you – were you able to – What did he tell you he graduated from Rice University in? Did he give you – Did he tell you?

A I don't remember if he told me.

Q Did he tell you whether or not he played football there or not?

A He – he played football – professional football somewhere else.

Q Okay. All right. Did you investigate to determine whether or not he graduated from Rice?

A Yes.

Q And?

A He did not graduate from Rice University?

Q Did he attend Rice University?

A No.

Q Okay. So, Doctor, that – saying I graduated from Rice University, saying I attended Rice University had absolutely nothing to do with whether or not he was guilty or innocent in this case. It has absolutely nothing to do with this case, no relevance whatsoever. Why would he tell you that?

A I think it's part of his – I think it's part of his narcissism and his building up of his own view of himself. And I think there are a lot of people, maybe us in this room, there are many, many people that can lie to themselves so extensively and for such a long period of time that they ultimately end up believing what the lie is.

MR. McCOY:

Well, also, did Officer Haynes tell you that the Shreveport Police –

THE COURT:

Mr. McCoy –

MR. McCOY:

What did the Shreveport policeman tell you?

THE COURT:

Mr. McCoy. Take the jury out, please.

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED FROM THE COURTROOM)

MR. SHERIFF:

Okay, sir.

THE COURT:

You may be seated. Mr. McCoy, I've already warned you this morning. I'll warn you one more time. No outbursts will be tolerated and that includes the audience. No discussion in the audience. And, Mr. McCoy, I am warning you one more time if you make an outburst again then I will take the appropriate action. So I am warning you to be quiet, please, sir.

MR. McCOY:

Yes, sir. Yes, sir, Your Honor. Your Honor, I want to ask you something.

THE COURT:

Mr. McCoy

MR. McCOY:

He just – he just said – but what about Officer Haynes. Will you ask him to vindicate what Officer Haynes told him –

THE COURT:

Mr. McCoy, you can ask your attorney –

MR. McCOY:

– about the person six-foot-one, 160 pounds with bright skin. That's what Officer Haynes told him. So I'm not lying about that. My daddy and them know about the same description. But they don't want to – to put it on record

THE COURT:

Mr. McCoy –

MR. McCOY:

They want to make it seem like something is wrong with me. There's nothing wrong with me, Your Honor.

THE COURT:

All right, Mr. McCoy, you can write those questions down and give them to your attorney to ask, but you are not to have an outburst in this courtroom again, sir.

All right?

MR. McCOY:

Yes, sir.

THE COURT:

Thank you, sir. All right.

MR. MARVIN:

May we approach, Your Honor, just on the time issue?

THE COURT:

Yes, sir.

(BENCH CONFERENCE - OFF THE RECORD)

THE COURT:

All right, bring back in the jury, please.

THE COURT:

Ladies and gentlemen, I'm going to ask for quiet in the courtroom. I'm not going to give an instruction again. If I have to give another instruction I will remove the offending party no matter who that is.

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED INTO COURTROOM)

MR. SHERIFF:

All jurors are present, Your Honor.

THE COURT:

You may be seated. Mr. English, you may proceed.

DIRECT EXAMINATION OF DR. VIGEN BY MR. ENGLISH (CONTINUED)

Q So, Dr. Vigen, you were – you were indicating that Robert refabricates and he creates these realities, correct?

A Yes.

Q Along that same line, I notice that one of the – you have on your report the Urshan Graduate School of Theology. Why is that on your report?

A Because Mr. McCoy said that he graduated from the Urshan Graduate School of Theology and he –

Q What is the Urshan School of Theology?

A It's – it's a school of Theology, but they have no record of Mr. McCoy ever being there.

Q You heard when I was asking Mr. McCoy yesterday while he was on the stand right before the District Attorney's Office objected about his bio. Robert indicated that he was a football star; that he excelled academically. And you were listening to his response to those questions, correct?

A Yes.

Q Do you – do you know whether or not that information was correct?

A I believe it was not correct.

Q Okay. So, refabric – refabrication – is an unfancy word is lying?

A Yes.

Q Okay.

A It's a little bit different in my mind than lying.

Q Okay. All right. Explain.

A Refabrication is – It's sort of an analogy of – one of my team brought this analogy to me. It's sort of like you have some object in your – in your grip. Maybe you – maybe it's a piece of clay or something. You have a – you've molded something in it and you refabricate it. You, you know, take things out of it and you put things back into it, but there's still some of the essence there and you remold it into something different. That's refabrication.

Q So if I challenge you on a lie that you're telling and I point out some inconsistency, what do you do?

A What do I personally do or what does he do?

Q No, what – what – what – what does he do?

A Well, I went and interviewed these people that he asked me to interview, including this Shreveport Officer Hines, and they – he told me what they'd say and he told me what they knew. And so, I said to Robert, I said, Robert, this is what they're saying. Well, when I offered what they were saying and that was different than what he said they would say, he would – his response was, well, they're police officers. They're not telling the whole truth or they're – they're being coerced into saying just what they're saying. And they're not just giving – They're not giving you, Dr. Vigen, the

whole – the whole truth. And I said, well, how it would be if I brought these men here to the correctional center and I'll ask permission to do that and bring them here and we'll have a three-way conversation. And he said, yes, let's do that. So, I was planning on doing that, but then by the end of the interview he said, no, we're not going to do that. We'll -I'll just deal with them in court. So, it's a – And this – this all happens very quickly and very fast. He's very fast at refabricating. And so, any time – And, of course, when I brought information to him that was different than the information he thought I would be have –be bringing, then I began to fall under his suspiciousness and be seen as, you know, more part of all of you all who are trying to convict him erroneously.

Q Isn't it true that Mr. McCoy believes that myself, every lawyer that he has – has been involved in this case, the District Attorney, you, everybody that's had – came into contact with him in this case, when they disagree with him what does he do?

A He divides them as – we become enemies. He breaks off conversation. He's unwilling to discuss. He's unwilling – He's just –he just stops relating to us and becomes angry with us.

Q Now, you've indicated and it's – we made clear a number of times that Mr. McCoy – the Court has found him mentally competent to stand trial, correct?

A Yes. Yes.

Q And we've come to – I also recognize that Mr. McCoy knows the difference between right and wrong?

A Yes.

Q Okay. And I say this not asking – because of what my personal experience is. So I just want to talk

about what I saw on the stand yesterday, okay, and what this Court saw on the stand yesterday, the bizarreness, the paranoia, the delusional. And when I take your, for lack of a better term, opinion or clinical diagnosis of the personality disorders, the technical evaluation that you have made of Mr. McCoy and – I'm not a clinical psychologist, but, Doctor, he's crazy to me. I mean he's crazy. He's not functioning. He can't assist in his defense. He's not in reality. I don't even think – It appears that he yet doesn't understand the gravity of what's going on here in this case. And so I'm asking you is Robert McCoy mentally ill?

A Well, I think Robert McCoy has a mental disorder. And if I were a layman and not looking at this from my point of view as a psychologist I can understand why you think or say or portray him as crazy. But crazy is not a term that we use in our profession. I mean there – I mean that's sort of a – it's a word and people – I mean I see people and I say, well, that's crazy to do that and, boy, that person looks crazy. But –

Q Well, let me – let me respond. You're right. Crazy is an unfair word. What I see, what I've dealt with the last two years, what I saw on that stand yesterday is someone who is severely mentally and emotionally defective. I saw someone – the person that I'm dealing with, that we all have been seeing in this courtroom for the last ten days is suffering from emotional and mental illness so that he cannot function. I do not believe that Mr. McCoy is with us right now.

MR. MARVIN:

Your Honor, he needs to ask the witness questions.

MR. ENGLISH:

I'm asking a question.

THE COURT:

I'll sustain –

Q What is wrong about what I'm saying? What's the clinical of what I'm saying?

A I believe – it's my opinion that Mr. McCoy has a personality disorder. May I define that?

Q Yes.

A A personality disorder is a deeply ingrained pattern of maladaptive behavior which interferes with a person's perceptions, thinking, interpersonal relationships and causes dysfunction in occupation and education and relationships. So, it's a deeply ingrained pattern of maladaptive behavior which severely interferes with people's interpersonal relationships. I think Mr. McCoy has that. And I think it's – it can best – In my understanding it's best understood as he has a narcissistic personality disorder. And, yes, it does interfere with your ability to work with him as his defense counsel. It interferes with my ability to work with him as a psychologist doing an evaluation. It is a – it interferes with interpersonal effectiveness and functioning. And I really believe that he has that disorder.

Q Is it – Do you recognize it as a serious disorder that impedes his ability to function regularly among regular people in a society?

A These disorders that I'm describing – And in mental health things are not, you know, just entities. They're – they're more – they're not discreet diagnostic entities. They're on continuums. Sort of like diabetes. You can have diabetes and you can have certain degrees of it. You can have high blood pressure, certain degrees of it. But – And the same is the case here and I

think he has a severe malignant – I'd call it a malignant personality disorder.

Q Define malignant.

A It's so invasive in his personality that it – it really renders him very ineffective in working with other people, particularly other people who have a different point of view than he.

Q Doctor, I stated to the jury that there's no reasonable way you can evaluate this evidence and not come to the conclusion that Robert McCoy was the cause of the murder of the victims in this case. You saw the evidence, correct?

A Yes.

Q And that evidence was put up on that screen?

A Yes.

Q Do you believe that Robert McCoy believes that he did not kill those people?

A I believe that he believes that to a great degree. I cannot tell you that he believes that a hundred – with 100 percent of his personality.

Q You reviewed Mr. McCoy's medical records since he was incarcerated, correct?

A Yes.

Q And Mr. McCoy has attempted suicide, correct?

A Yes.

Q Can you tell the jury how many times your records show? I tell you what, let me just tell you what I have here. Okay. All right. And then we can talk

about them. The first one was five - - Well, let me ask you this question. What is guilt? What is guilt?

A Guilt is experienced as an emotion. And I think it is related to repressed anger. And I think it occurs when an individual crosses a moral boundary or when his behavior or his thoughts or his, you know, what he is, when he crosses a boundary, a moral boundary where he violates some type of a value, or a personal value. So, you know, if – if a person, you know, takes advantage of another person and so – and that's against his moral value he would feel guilty for that.

Q Is suicide one – Is suicide an – a manifestation of guilt?

A It – it's not always, but it can be.

Q It can be. Okay. And so, let's talk about that. You reviewed the records. When Mr. McCoy was arrested on 5-12-08 in Idaho, he was found in his jail cell. He tried to hang himself.

A Yes.

Q Is that what your – is that what your records show?

A Yes.

Q You reviewed those records?

A Yes.

Q From your – from a clinical diagnosis can you tell – what can you tell me about that?

A It looks like a suicide attempt.

Q Mr. Gayle Houston, you heard – Did you hear his – any of his testimony yesterday?

A I did not.

Q Mr. Gayle Houston testified that he and Mr. McCoy's brother picked Mr. McCoy up immediately after – You've read that, correct?

A I've read that, but I didn't hear his testimony.

Q Okay. And he indicated in his testimony yesterday, and to the police report, that Mr. McCoy was crying and that Mr. McCoy said I'll kill myself. I'm going to kill myself before I let them take me.

MR. McCOY:

Your Honor, may I have a moment, please, sir?

THE COURT:

Mr. McCoy. Excuse me, all rise for the jury, please.

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED OUT OF COURTROOM)

MR. SHERIFF:

The hall is clear.

THE COURT:

All right. You may be seated. Mr. McCoy, this is the third time I've warned you this morning. Deputies, I will allow you to remove Mr. McCoy to an area where he can hear the proceedings, sir.

MR. McCOY:

You see how he's lying, Mama. Y'all've got the medical records. You see how they're sitting in here lying.

(MR. McCOY REMOVED FROM THE COURTROOM)

THE COURT:

I place on the record that the deputies have made accommodation that Mr. McCoy will be removed from the room; that he will be able to hear the proceedings and that I will allow Mr. English to confer with Mr. McCoy after or before he completes his examination of Mr. – of Dr. Mark Vigen. So –

MR. ENGLISH:

What do we – what do we tell the jury, Your Honor?

MR. MARVIN:

I would suggest that you just tell the jury that Mr. McCoy –

THE COURT:

I need you next to a microphone, please.

MR. MARVIN:

That he's been removed from the courtroom, but he's still able to hear the proceedings and participate in these proceedings temp – And I would say it's temporarily.

THE COURT:

And it is temporary. He has the opportunity to come back into these proceedings. Mr. English, I will question him in just a few minutes and see if wishes to participate in the proceedings. I've only removed him temporarily from the proceedings.

MR. ENGLISH:

Your Honor, may I recommend that Mr. Marvin and I talk. It's 12:10. May I recommend that we break

now and maybe Mr. McCoy will have calmed down by the time we get back and you can bring him back in.

THE COURT:

All right.

MR. ENGLISH:

And so we don't have to tell the jury anything.

MR. MARVIN:

And he's not through with Dr. Vigen, I understand that.

MR. ENGLISH:

And I'm not through with Dr. Vigen.

THE COURT:

I understand. I'm not – I'm not going to tell the jury anything. I'm just going to tell them that it's a good opportunity for a break at this time and that we're running into the lunch hour. And, gentlemen, I would like to meet with y'all at 1:15. We'll start back at 1:30 promptly, but I'd like to meet with y'all about 1:15 just to go over jury instructions.

MR. ENGLISH:

That's fine, Your Honor. Do we have a copy of the final jury instructions?

THE COURT:

I will get to them to you in just a minute.

MR. ENGLISH:

Okay. That's fine, Your Honor.

THE COURT:

Mr. Marvin – Let me bring the jury back in and instruct them on that.

MR. MARVIN:

Are you going to bring them in?

THE COURT:

Yes, sir, I am.

MR. MARVIN:

I don't have an objection if you just want to send a bailiff to tell them that we broke for lunch. That's –

THE COURT:

I do want to give them instructions –

MR. MARVIN:

Okay.

THE COURT:

– that they're not to discuss the case though.

MR. MARVIN:

Okay. That's fine.

THE COURT:

All right.

MR. MARVIN:

We're going to start back at around 1:30?

THE COURT:

Yes, sir, but I need you –

MR. MARVIN:

But us meet you here at 1:15?

THE COURT:

Yes, sir, 1:15. Yes, sir, please. Mr. English, I'll have my law clerk bring you a copy down. And, Mr. Marvin, where would you like us to bring your copy of the instructions, please?

MR. MARVIN:

They can just come – bring it to my lobby and somebody – they'll bring it to me.

THE COURT:

All right, sir.

MR. ENGLISH:

I'll be either in my – I'm sorry, my little office there or the dining room – the cafeteria, Your Honor.

THE COURT:

Yes, sir.

MR. MARVIN:

Actually, if you'll just tap on that first door of my office we're in the conference room. Do you know where I'm talking about?

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED INTO COURTROOM)

MR. SHERIFF:

All jurors are present, Your Honor.

THE COURT:

Ladies and gentlemen, instead of being seated, this is a good opportunity to break for lunch, so we're going to break for lunch until 1:30. We'll be back promptly at 1:30. You' re – I hope you have a good lunch.

You're not to discuss this case. You cannot discuss this case amongst yourselves or with anyone at this time and I'm giving you that instruction. So you're not to discuss this case at this time during your lunch period. All right. So, thank you. You may take the jury to lunch, Deputy.

(JURY ESCORTED OUT OF COURTROOM)

THE COURT:

Is the hallway clear?

MR. SHERIFF:

Yes, sir.

THE COURT:

All right. The hallway is clear. We'll stand at ease until – I will be back in here at 1:15, but we'll start the trial back at 1:30.

MR. ENGLISH:

That's fine, Your Honor.

THE COURT:

All right.

MR. SHERIFF:

Trial is in recess until 1:30.

(COURT RECESSES)

(COURT RECONVENES)

THE COURT:

All right, Mr. Marvin?

MR. MARVIN:

Yes, sir.

THE COURT:

You're present, is that right? I was just making sure you were present in the courtroom?

MR. MARVIN:

Yes.

THE COURT:

Mr. English, you're present in the courtroom and Mr. McCoy is present in the courtroom?

MR. ENGLISH:

That's correct, Your Honor.

THE COURT:

All right. Mr. McCoy, sir, you have the right to write questions to your attorney. I don't need any statements or anything like that. You have the right to write questions to your attorney. You can disagree with the testimony that's taking place. You can ask him -what you did during the course of these proceedings -to ask any questions that you want him to ask and slide those to Mr. English and let him ask you those questions – ask those questions. I don't need any statements, please, Mr. McCoy. I'm just doing the best that I can with trying to keep everything even-keeled. I need you to sit in that chair and be quiet. And you can slide your questions to Mr. English. You can ask him to ask any questions of Dr. Vigen that you want him to ask and do whatever you need to do. But I cannot have those with you speaking out like that. All right, sir?

MR. McCOY:

Yes, sir, Your Honor. Your Honor, please, give me a second. Your Honor, it's hard to sit in the courtroom,

Your Honor, when you know that it isn't the truth, Your Honor. I don't mean to be curt or disrespectful, Your Honor. Lord knows I don't.

THE COURT:

Yes, sir.

MR. McCOY:

But, Your Honor, it's very hard, Your Honor –

THE COURT:

I know.

MR. McCOY:

– to sit in this courtroom. And this is supposed to be my counsel, Your Honor. He talked about me worser than the bottom of somebody's shoes, Your Honor. That's not a professional obligation. He do not supposed to do what he's doing here today, Your Honor. You know that and everybody in this courtroom knows this, Your Honor. And this is the only thing that, you know, is so vindictive about it. He's – he's not doing his job. And that's the only thing I'm saying, Your Honor. He's not doing his job.

THE COURT:

Okay. And I understand that, Mr. McCoy, and I - Mr. McCoy, I understand what you're saying. I have listened to that. I understand that. But, sir, I'm telling you disrupting them from hearing what the expert is saying – they need to be able to hear that. So, I'm asking you and we'll – you and I've talked.

MR. McCOY:

Yes, we have, Your Honor.

THE COURT:

And I – you know me. I try to call it like I see it, sir. But I'm asking you to please not disrupt the courtroom. And I'm asking you that as a gentleman. Can you do that, sir?

MR. McCOY:

Yes, sir, I can, Your Honor. I give you my word as a gentleman. I won't interrupt anymore.

THE COURT:

All right, Mr. McCoy, I appreciate that, sir. All right, thank you very much, sir. All right, Mr. Marvin. You have had an opportunity to read the instructions to the jury?

MR. MARVIN:

We have, Your Honor. I don't have a problem with anything in here.

THE COURT:

All right, Mr. English, you've had the opportunity to read the instructions, is that correct?

MR. ENGLISH:

I have, Your Honor.

THE COURT:

Do you have any changes?

MR. ENGLISH:

I don't, Your Honor.

THE COURT:

All right. Then I will ask my law clerk to go upstairs and make this a final original copy of everything that will be given to the jury. All right.

MR. SHERIFF:

Are you ready for the audience to come in?

THE COURT:

Yes, sir, I am ready for the audience to be brought in. Yes, and let Ms. Gregrich go get the evidence please.

(AUDIENCE ALLOWED INTO COURTROOM)

MR. MARVIN:

Your Honor?

THE COURT:

Yes,

MR. MARVIN:

On the jury charge, it looks like –

THE COURT:

Get next to a microphone, please.

MR. MARVIN:

Can we – There's one thing that – at the top of the second page where you talk about aggravated burglary?

THE COURT:

Yes, sir.

MR. MARVIN:

I think it's paragraph three of the statute that says that you – someone that commits a battery after entering a residence – That first part where if you arm yourself with a dangerous weapon, or you arm yourself with a dangerous weapon after entering, or you commit a battery on a person while in the residence.

MR. ENGLISH:

I question why do we even need that instruction, Your Honor. It's irrelevant to the case.

THE COURT:

All right.

MR. MARVIN:

Well, it's relevant because –

THE COURT:

Get next to the microphone, please.

MR. MARVIN:

– it's – because that's one of the ways that a case can be first degree murder.

MR. ENGLISH:

But it's – it's contingent upon that there was an initial intent to burglarize.

MR. MARVIN:

No. If you commit a battery on a person after entering or –

MR. ENGLISH:

Oh, we're at the page – Now, tell me again what you're talking about.

MR. MARVIN:

Well, it's not on here. But aggravated burglary is where you are armed when you are committing a burglary or arm yourself after you've entered the structure, or -

THE COURT:

Can I read the statute to you since I have it in front of me?

MR. MARVIN:

Yes.

THE COURT:

May I read the statute to you?

MR. ENGLISH:

Yes, Your Honor.

THE COURT:

All right. "Aggravated Burglary is the unauthorized entering of any inhabited dwelling or any structure, watercraft or movable where a person is present with the intent to commit a felony or any theft therein if the offender (1) is armed with a dangerous weapon; or (2) after entering arms himself with a dangerous weapon; or (3) commits a battery upon any person while in such place or in entering or leaving such place." And that's what the statute says. So, the instruction says, "Aggravated burglary is the unauthorized entering of any inhabited dwelling with the specific intent to commit a felony or theft therein if the defendant is armed with a dangerous weapon or arms himself with a dangerous weapon after entering."

MR. ENGLISH:

So there has been no evidence in this case that there was an unauthorized entry. None.

MR. MARVIN:

Well –

THE COURT:

All right.

MR. MARVIN:

Your Honor, I mean he came to their house with a gun.

MR. ENGLISH:

But if they opened the door and let their son-in-law in, that's not an unauthorized entry.

MR. MARVIN:

Okay. But it becomes one if you arm yourself after you got in there – if he just picked up a gun off their floor.

MR. ENGLISH:

Read the statute again for me, Judge. I'm sorry.

THE COURT:

Aggravated burglary is the unauthorized entering - Excuse me. "Aggravated burglary is the unauthorized entering of any inhabited dwelling or any structure, watercraft or movable, where a person is present with the intent to commit a felony or any theft therein if the offender is armed with a dangerous weapon; or (2) after entering himself (sic) arms himself with a dangerous weapon; or (3) commits a battery upon any person while in such place or in entering or leaving such place.

MR. ENGLISH:

The chair of an aggravated battery is unauthorized entry. That's what the chair is. There has been no evidence put in front of this jury or no accusation put in front of this jury that the entry inside the in-laws' house of Mr. McCoy was unauthorized.

MR. MARVIN:

Well, what is S-1? The 911 call. Do you think she invited him in and then called 911 screaming?

MR. ENGLISH:

That's – that's – that's – the facts of this case. The evidence in this case is he is inside the house. Those are his in-laws' house. There's been no evidence put forward in this case that Mr. McCoy forced his way in, broke into the house or did anything. It's not – that is not in the evidence in this case.

MR. MARVIN:

Your Honor, we have – we have shown the jury, let them listen to that 911 tape. I can't produce Christine Colston here today to tell you she didn't want him in that house. And I can't produce Willie Young to tell them he didn't invite him into the house. And I can't produce Gregory for the same reason. This is ridiculous. Aggravated battery – burglary is in the first degree statute and the facts would way more indicate that he did not have authority to be in that house than they do not. And there's been a mountain of evidence. They've seen what the house looked like and the dead bodies inside. It's in the first degree murder statute. We're only asking that you just read the entire statute. I don't have a problem taking out the watercraft or movable because those obviously don't apply. But other than that just read the entire statute. I mean just – just instruct them on the entire statute.

MR. ENGLISH:

Your Honor, let me just respond briefly and then the Court can make a decision. There's been numerous police officers testified about the crime scene. There was no testimony that there was a forced entry. There was no testimony that the back window was broke out.

There was no testimony that the kitchen door was kicked in. As Mr. Marvin can make that argument, I can make the argument that Mr. McCoy knocked on the door to his in-laws and his in-laws opened the door and he went in.

MR. MARVIN:

Well, I welcome that opportunity to argue that. He can argue it to the jury and I can argue it to the jury and they can believe whatever they want.

THE COURT:

All right. My first impression is that this is -what he is stating is an aggravating factor which can be argued. It is able to be argued by you the other side of that that that aggravating factor does not apply. I will not make that my final ruling. I will ask my law clerk while we are doing this to check the case law regarding this. But that is my first impression at this point in time.

MR. ENGLISH:

That's fine, Your Honor.

THE COURT:

But I will not make that my final ruling, but I will ask him to check that and as soon as he finds the law on that I will ask him to come back down. Mr. Marvin, are there any other corrections that you see that need to be made to this charge from your side, sir?

MR. MARVIN:

No, sir.

THE COURT:

Mr. English, do you see any other corrections other than that objection that you've raised that need to be made to these charges, sir?

MR. ENGLISH:

No, Your Honor.

THE COURT:

Then I will ask that you go upstairs and look. All right, any other matters that need to be taken up outside the presence of the jury, Mr. Marvin?

MR. MARVIN:

No, sir.

THE COURT:

Mr. English?

MR. ENGLISH:

None, Your Honor.

MR. SHERIFF:

All rise for the jury.

(JURY ESCORTED INTO COURTROOM)

MR. SHERIFF:

All jurors are present, Your Honor.

THE COURT:

You may be seated. Mr. English, you may proceed, sir.

DIRECT EXAMINATION OF DR. VIGEN BY MR. ENGLISH (CONTINUED):

Q Dr. Vigen, I just want to – before we pick back up I wanted to – I needed to ask you about a couple of items. In your collateral interviews, you interviewed

Marcus Hines and Mr. McCoy has referred to Marcus Hines a number of times.

A Yes, sir.

Q What was that interview about?

A Mr. McCoy said that Marcus Hines is a Shreveport police officer and Marcus – Mr. McCoy said that he will say that Mr. -that Mr. McCoy did not fit the detectives' description in Bossier City; and that Marcus Hines would go to his mother and father's home, Mr. McCoy's mother's and father's home, that night. And so –

Q It – Was it that night of the – the murders, correct?

A Of the murders, yes.

Q Yes.

A So I interviewed Shreveport police officer Marcus Hines and he said that he has known Mr. McCoy all of his life; that he lived across the street from Mr. McCoy's grandmother. He heard the dispatch about Robert McCoy and the description given by the dispatcher was of a skinny guy that they were looking for. And Officer Hines said that he hadn't seen Mr. McCoy prior to the incident in many years and he knew that Mr. McCoy was a more stocky and muscular man, so he thought that the dispatcher describing a skinny man was mistaken. But he did know Mr. McCoy and so, he, Marcus Hines and six other Shreveport police officers went to the home of Mr. and Mrs. – of Mr. McCoy's parents and they told them that they were looking for Mr. McCoy and he admitted that he went there with six other officers.

Q So – so Marcus Hines didn't have – doesn't have – Mr. McCoy is indicating that Officer Hines has information and is being excluded from this trial that may be able to show his innocence when, in fact, Marcus Hines went to his parents' house with six other office – officers in order to see if Mr. McCoy was there and arrest him?

A That's correct.

Q Okay.

A But the point for me that's important is that there's a small kernel of truth in Mr. McCoy's understanding of this and maybe the description from the dispatcher was somewhat disparate from what Mr. McCoy is really like, but that disparity doesn't mean that there's a conspiracy by Officer Humphrey and Mr. Marvin and all the other police officers.

Q And so he took that small nugget and refabricated it?

A Yes. That's – that's an example of it.

Q And – and what you say is a malignant part of his personality?

A Yes.

Q One of the individuals that you interviewed was Judge Shonda Stone?

A Yes.

Q Would you explain that one for us?

A Yes. Shondra – S-h-o-n-d-a, Shonda Stone is now a Shreveport Juvenile Court judge, but at the time that this occurred she was a practicing lawyer. And Mr. McCoy said that she had agreed to represent him in his divorce, I think, from Yolanda, but that she had

backed out and that she knew that Yolanda had been unfaithful to Mr. McCoy.

Q Did you interview Judge Stone?

A Yes, I did.

Q And what did you find?

A Well, essentially without going into – reading the notes exactly, Judge Stone, as a lawyer, said that she was coming out of her office, she met Mr. McCoy in downtown Shreveport. He was on the street. He looked very distraught. She spoke to him. He asked her whether she was an attorney. She said yes. And she said is there something she could do for him. And – and eventually she invited him to come up to her office and he explained that he was getting this divorce and so on and would she represent him. She said that she'd be willing to represent him, but gave her – gave him fee schedules and so on and – and he said he didn't have that money at that point but that he would call her back. And eventually I think an appointment was set for her to meet with him again and the appointment was around the time that these killings occurred and he didn't come for the appointment. And so, she didn't have her – have a chance to represent him.

Q And – But she had no knowledge of Yolanda Colston having affairs as Mr. McCoy had told you?

A Just other than him telling – other than Mr. McCoy informing her of that. I mean she had no independent knowledge, but somehow, again, this is another sort of a kernel of truth that I think he has refabricated in his mind thinking that this judge, Judge Stone, is somehow going to validate –

Q And vindicate him?

A – and vindicate his perceptions of all this.

Q Okay. I want to – we were – before we broke for lunch as we indicated the records show that Mr. McCoy has attempted suicide a number of times.

A Yes.

Q In your opinion were these serious suicides?

A Well, all suicide attempts are serious, but they – they appeared – the corrections officers at the Bossier correctional facilities have considered them very serious, and apparently the officers in Lewiston, Idaho, considered them serious.

Q So – So I want to talk to you briefly about them. On 5-12-08 – So – I'm sorry, when we broke I was indicating to you – I want to refresh the jury and your memory – was that Mr. Gayle Houston testified that when he came in contact with Mr. McCoy immediately after these murders had taken place he was crying and he was telling them that he was going to commit suicide, he wasn't going back. Now, does that sound like to you that somebody is calm and disassociated from the events that he has –he has just engaged in?

A It doesn't sound like he's calm. And I don't know what you mean by disassociated.

Q I mean – I mean – I mean does it sound like someone who's distraught?

A Yes.

Q Okay. That's what I wanted to ask you. Okay. And then he's subsequently arrested on 5-12-08 in Lewiston, Idaho, where he's -he's found in the jail cell, has tied sheets around his neck and attempted to hang himself. Am I – am I – is that – is that correct?

A Yes, sir.

Q Okay. And is unconscious and rushed to the hospital?

A Yes.

Q Now, what does that tell you about Mr. McCoy's mental state immediately after these murders had taken place?

A You know, I didn't examine him before, during or after.

Q Okay.

A I don't – I don't know – All I know is what you all know in that it was a suicide attempt.

Q Okay.

A And so I don't know –

Q Can – can you glean from the fact that he's attempting to commit suicide – You know, let me ask you this. Does – Again, does that show that someone is in distress and feeling guilt about what they've done?

A Yes, it can.

Q Let me ask you this question. What is – what are the causes of suicide? Let's answer that question right fast. What are the causes of suicide?

A Well, people commit suicide for all kinds of – attempt and commit suicide for different reasons. People who are extremely depressed attempt suicide. People who are impulsive attempt suicide. People who are psychotic and hearing voices ordering them to commit suicide commit suicide. People who have not lived up to other people's expectations often commit suicide. People who are elderly or even people who

have serious physical disorders like Lou Gehrig's disease, ALS, or something like that, where they're facing such a debilitating and terrible disease often commit suicide. People commit suicide because they've committed a bad act and they feel badly about it and they want to punish themselves before other people get a chance to punish them. And then there's a group of people that from early, early childhood feel like they should not be; that they have no right to exist; that they're not important; and they are ashamed to be – to live and they often commit suicide out of shame. So, you have a whole host of reasons why people attempt and/or commit suicide.

Q And – All right, I want to – knowing what you know from Mr. McCoy and knowing how many times he's attempted suicide since he's been incarcerated, which one of those do you think he fits in?

A Well, again, I see – I see Mr. McCoy as this façade, a shell where there's no inner – inner core personality. There's no real self inside. And so, if there's an assault to this façade that he presents and wants to maintain for himself, if there's an attack on that he's going to feel an immense sense of inadequacy and he's got to rebuild the façade quickly by all the means we're talking about. So my guess is when his defenses go so low then he has to refabricate and rebuild. And I think, you know, the most obvious thing to me and I don't know if it's – is, you know, that he's done a horrible and terrible act. He's taken the lives of three innocent people. That is horrific. And you do that and it's hard to maintain any kind of façade given that type of behavior.

Q Is he feeling guilt?

A I would say he's – his defenses are so low he's – he feels guilt and he probably has to do whatever he can to rebuild the facade immediately.

Q Okay. So, in addition to that suicide attempt he's put on suicide watch and then he's transferred to Bossier Maximum?

A Yes.

Q And he is subsequently found in a second suicide attempt where he swallowed razor blades. Are you familiar with that one?

A Yes.

Q Now – And the description of what the deputies – I believe it happened on 6-8-08, and what the personnel found is pretty graphic. Do you have any doubt that Mr. McCoy – that was a serious suicide attempt?

A No. Like I – Like I said, I think the – the personnel at the correctional facility were taking it very seriously and they have during his entire incarceration there.

Q The next suicide attempt Mr. McCoy – Again, I believe this is in July of '08, Mr. McCoy – This happened on 7-21-08. Mr. McCoy begins coughing and complaining he could not breathe. McCoy began throwing up large amounts of what appeared to be toilet paper. He had stuffed paper down his throat to choke – That's on 7 –

A 7-21.

Q 7-21-08?

A Yes.

Q Do you view that as a serious suicide attempt?

A Yeah – Yes.

Q And this is some – within two and a half months after these murders have been committed?

A Yes.

Q And he's – and he's attempted three suicides on that one. And on 7-29 Mr. McCoy attempts to commit suicide by chewing his arm off. Are you familiar with that one?

A Yes, sir.

Q In fact, the wound is so bad he loses so much blood he's rushed to the hospital?

A Yes.

Q And, in fact, he's fighting the EMS people the whole way, isn't that correct?

A Yes.

Q Who are trying to save his life?

A Yes.

Q His behavior is so erratic. He's so focused on going through with the suicide that when he gets to the hospital they vent him, is that correct?

A Yes.

Q What does that mean when you say "vent"?

A Well, they artificially breathe for him. They sedate him with medications and then breathe for him.

Q Now, Mr. McCoy indicated that he was vented and put on a ventilator because he was having trouble – trouble breathing? Have you reviewed those medical records?

A Yes.

Q Is that true?

A No.

Q Why was he vented?

A Because he was combative.

Q And it was the only way that they could – could restrain him?

A Right. The medical people needed to restrain him in order to treat him. They could not treat him when he was that combative.

Q Okay, Doctor, and all of this is happening within sixty days, two and a half months of the murders taking place?

A Yes.

Q Now, I want to ask you again, you – you've given a very serious diagnosis of Mr. McCoy with a very serious personality disorder. I think you used the word "malignant". Okay. Mr. McCoy is – Doctor, I'm sorry, trying to chew your arm off doesn't sound normal to me. That's deeper than trying to go suicidal to me as a lay person. That doesn't sound normal to me. That is a severe – What does the word "disassociation" mean? What is that? A Well, there's a diagnosis called Dissociative Disorder in the diagnostic and statistical manual. And essentially, if you can think of – a simple example is when any of us drive like from here to Baton Rouge or something and we don't remember going through Alexandria. We were thinking about something else so we were sort of not focused, but yet we drove perfectly well. So we sort of disassociate in a very light easy way. And, you know, if you go to more severe examples, for example, children who are attacked sexually often sort of – during the attack they sort of leave the

area. They sort of leave their bodies and they disassociate from what's going on and they go elsewhere in their minds. And so, they're not present as a way of defending against the pain of someone attacking them. And so, dissociative disorders are associated when somebody does something so horrific or something is happening that is so horrific they sort of leave mentally and emotionally. And we certainly considered the dissociative disorder when I learned that Mr. McCoy was chewing off his arm because that – to be chewing at your arm you sort -to do that behavior you sort of have to have some kind of distance from yourself in order to do it. And it is – it is, indeed, serious. It's – And there is a different personality disorder called the borderline personality disorder which is also very, very severe. And it has within it – its diagnostic characters are self-mutilation. People cut themselves frequently to alleviate pain or they do self-destructive body things, usually cutting. And, you know, when a person is in such an immense amount of emotional pain they sometimes cut themselves as a way of de-focusing on how badly they feel and then they can focus on self-mutilation. So I considered the dissociative disorder and maybe Mr. McCoy was dissociating when he was chewing at his arm. But I – I did not make that diagnosis because it does not comply – it doesn't fit with the whole pattern here of his behavior. So I ruled that out.

Q So, let me ask you again and we'll move on. So you agree that that's a pretty serious – It's not pretty serious. That is very serious for someone to start trying to chew their arm off and bleed to death?

A Well, you know, it obviously is serious. But Mr. – Mr. – And you have to – In my experience, there are a lot of people that are, you know, that may cut themselves for attention and so on, or –

Q Okay. Wait – Go ahead. No, go ahead. Go ahead.

A Not that that's not serious. I don't think cutting yourself just to get attention is a very – is a very healthy kind of behavior. But, you know, certainly chewing your arm, I would agree with you is a serious behavior.

Q I believe that the medical records stated that Mr. McCoy pulled a sheet over him?

A Yes, trying to hide that.

Q Hiding from the personnel to see him and began chewing his arm off. So if he's looking for attention, you don't pull a sheet over yourself do you and hide, do you?

A No, you wouldn't. That's true.

Q Now, given what your diagnosis of Mr. McCoy is, your clinical diagnosis that you stated for the jury, given the rash of suicide attempts that Mr. McCoy has undertaken, given the bizarre behavior that we've seen in this courtroom and we saw from this witness stand, can we agree that Mr. McCoy is suffering from serious emotional and mental illness?

A I – From my point of view he has a serious personality disorder which is a mental illness – is a mental disorder. So, when I make a diagnosis I diagnose the presence or the absence of a mental disorder. And I believe he has a paranoid personality disorder.

Q Mr. McCoy has been found guilty of killing three people. Three innocent people.

A Yes, sir.

Q Can you state with any certainty that the diagnosis which you have made of Mr. McCoy of what you have just said, can you make with any certainty that it played a role in his mind when he was in that house?

A Well, I can say that it certainly – Yes, I think it played a role. I couldn't say that it caused the – the – the murder of these three people. It's not causative, but it certainly played a role. It's played a role in all of his dysfunctional relationships in his life. And it certainly could have – it certainly could have played a very big role in this, sure.

Q Could it have played a significant role in what – Because we don't know what was going on in Mr. McCoy's mind. Nobody knows. And Mr. McCoy hasn't talked to you, has he?

A He won't – he won't –

Q He hasn't – Go ahead. He hasn't?

A No. Mr. McCoy – I don't – I've not been able to understand Mr. McCoy and what happened in that home and what was in his mind. I don't know.

Q And he – he – he's never ever up to this day acknowledged that he was even in that house and that he committed the murders, correct?

A That's correct.

Q But from – In your professional opinion, whatever was going on in his mind in that house his malignant personality disorder would have had a significant impact on his thought process?

A I – I think it certainly was – He certainly had the personality disorder prior to, during and now. And it certainly influenced his behavior in that house.

Q Doctor, we started off by saying that you have had a lot of experience dealing in capital cases, correct?

A Yes.

Q How many times have you been to Angola?

A Probably between ten and twenty times.

Q And do you presently have people that you are working with that are on death row?

A No.

Q Okay. You have had people in the past –

A Yes.

Q – that you worked with on death row? I want to ask you a few questions about that. Describe what it's like for a person to be on death row.

A Well, Angola is a – is 18,000 acres. About 5,000 of the acres are used for about – between seven, eight or nine different prisons in the prison. It's called the Louisiana State Penitentiary at Angola. And your question is describe –

Q Specifically about death row.

A Okay. Death row – The last time I was on death row it's -there are individual cells on three tiers. And the cells are about 8 by 10. And there's a bunk, and a sink, and a toilet and three walls are concrete block, or concrete, and one wall is bars. The bars look out onto a tier and if you're on the bottom floor they're out onto the floor. If you're on the second or third floor you look out onto windows. Down at the end of the tier -are some telephones that can be used and some showers. And the inmate – I think generally an inmate who is housed on death row spends twenty-four or twenty-three of twenty-four hours in the cell. And sometime

during a twenty-four-hour cycle, totally unpredictable I believe to the inmate, the inmate is taken out and can either go outside and recreate and they have like dog runs. They're kind of – they're wire mesh outside areas that are covered on the top and on all sides basketball courts – small court in basketball so you can be outside and can recreate or he can use that time to shower and/or make calls and so on. So it's a very confined space. All the food is brought to the inmate in the cell, three meals a day. And whenever the inmate leaves the cell he's accompanied by two corrections officers. He's shackled at the wrist and at the – at the ankles and he's always escorted by two corrections officers in coming and going and so on. So it's a very – it's a very high security constricted, pretty much emotionally – emotional-sensory depravation kind of living.

Q Is he allowed visitors?

A Yes. Yes.

Q What about human contact?

A The men on death row have very, very little tactical contact with anyone else other than perhaps a doctor or a nurse who might be examining them in the infirmary.

Q Can you describe for the jury – I don't know the word for it, but just briefly can you describe for the jury what happens in an execution?

A Well, I've never been in an execution. I have been in the death chambers in Mississippi, Louisiana and – and Texas, at Huntsville, Texas, where the executions occur at the Walls Unit.

MR. MARVIN:

Your Honor, we're going to object. I think that's outside Dr. Vigen's field of expertise, number one. Number two, he told us he hasn't even ever seen one.

So, I don't think it's in his field – within his field of expertise to be informing the jury on that subject.

MR. ENGLISH:

Let me withdraw my question and let me see if I can't lay some foundation and see if that would get us past the objection.

Q You have –

MR. ENGLISH:

I withdraw that question, Your Honor.

Q You have spent your career studying and writing about capital cases, correct?

A That's an aspect. It's not all that I –

Q I – I – No, I'm saying about generally capital – capital cases in general?

A Yes.

Q Have you during your career ever studied and looked at the actual execution itself?

A I've never watched an execution.

Q I'm not asking you whether or not you watched them. I'm asking you have you ever written about and studied the actual execution itself?

A I've studied about it. I've not written about it.

Q Okay. Do you feel confident that what you studied that you have a good idea of what happens inside of an execution?

A Well, Warden Cain has explained it to me. I've – Like I said, I've visited the chambers.

MR. MARVIN:

Your Honor, I still object. This is not – It has nothing to do with psychology. It's nothing within his field. It would be no different than someone else that had read a book about it getting up there and saying that. It's just beyond the scope of his field of expertise.

THE COURT:

I'll sustain at this time, Mr. English.

Q Let's talk about life. I mean do you – Again, you – you've visited Angola. You've dealt with capital cases. You have an idea of what life at Angola is like?

A Yes.

Q Can you describe it for the jury?

A Yes. Let me just lay a foundation on that myself, if I may. A recent project that I had the privilege of doing was interviewing men who were on death row for video – on video tape and then interviewing men who had been on death row who had received life sentences. And we use those tapes with the Indigent Defenders Office in Caddo Parish with inmates who are offered a life sentence and want to resist that and not accept it. But in – in the prison there during all of these interviews that took place at Angola most inmates live in large dormitories where ninety men live. You have to know that there are about 5200 inmates at Angola. Four thousand or so are there for life. So the majority of the people that are at Angola are there sentenced to life. And so, the lifers live in large dormitories of ninety men. There are fans. They have small bunks, I think 18 to 24 inches wide. They have a small locker that ex-

ists under the bunks where they – where their total belongings are. And they get up in the morning and they shower in a large room. They use the toilet facilities in a large open room. They prepare for work. They eat. And during their first years in prison they spend most of their time working in the fields. They come back for lunch. They go back, receive their tools. They work in the fields in the afternoon. And then in the evening they may have some free time in a recreational area or so on. But they – they essentially live in large dormitories for many, many years before they are allowed to live in smaller facilities with – with more privacy.

Q As I read through the jury questionnaires, the majority of the people when asked do you believe that life in – that prisoners who have long prison sentences live better than those on the outside, just regular citizens, an extraordinary number of jurors checked that they believe that. In your opinion, is that true?

A Well, prison life, as I appreciate it having been in a lot of them, is very regulated. And so, you lose freedom. And, you know, you're told when to get up and where to go and what to do and how to do it and when to go through this door and when to go through that door. It's just a tremendous loss of freedom of movement. I mean it is very sparse physical facilities. You don't own much. You don't have much privacy. And you generally work with a whole bunch of other men who have been convicted of violent crimes. And you're told what to do and when to do it and where to do it.

Q And prison life – long-term prison life develops its own culture, correct?

A Yes.

Q So I'm assuming that if you are one of 4,000 other individuals sentenced to life and are all sentenced to life for committing violent crimes, that's not easy to navigate?

A Well, it's – it is not easy to navigate and it's sort of counterintuitive. You'd think that when you put all of these violent people together that have committed violent crimes that the prison would be a very violent place to live. That's what we would assume. But prison's actually – It's counterintuitive. Prisons actually do work. And we have very good prisons. I think Louisiana State Penitentiary is an excellent prison. I think the prison system in Texas is an excellent system. You have a lot of control. You have professional corrections officer. You don't have the presence of alcohol, drugs and weapons and guns, even though there are exceptions to that. But prisons control behavior and prisons work in terms of reducing violence. The violence levels inmate on inmate and inmate on staff at Louisiana State Penitentiary are low.

Q But my question to you is I would assume that you would think twice about BS'ing someone who you're living with who's a violent criminal. There's a code among those prisoners. Am I right?

A I think living with other inmates who are good at conning behavior are not as easily conned as the rest of us might be. I mean I think living with inmates there's going to – you're going to get away with a lot less conning of them I guess. Is that what you're wanting?

Q That's what – that's the question I'm asking. That's exactly what I'm asking.

A I haven't researched that issue.

Q If you can't speak to it, I understand. Go ahead.

A I would think that's the case.

Q Okay.

A I mean you're living with a pretty hard group – hardcore group of guys.

Q What is the cost to taxpayers and citizens for an inmate that's on death row?

A Well, generally – And the literature on that is very wide and it's very hard to understand it because there's so many states and everybody calculates everything differently.

Q Can you give me a general notion – a general idea? I understand that you can't speak specifically –

A What I believe about it is that an inmate serving a life sentence versus a death sentence, the death sentence is going to cost about four times more than the life sentence in overall taxpayer dollars.

Q And is it safe to say that an individual on death row could cost the taxpayers tens of millions of dollars?

A Yes, there are studies that show that. Do you want me to explain that?

Q Sure.

A Well, there are many people who are – I think 60 percent or so of people who are sentenced to death don't actually receive the death penalty. There – there are many people whose cases are overturned, people who die and so on. And so, I think about a third of those sentenced to death actually get close to death. So when you have all those people going through a process – I mean the trial court is an expensive process. This

trial court's been run very efficiently. But trial courts are – are expensive. Appeals are expensive. Some things are remanded back to the trial court. Other – other cases come back and get new trials. Other cases get new hearings. So there's just a lot of litigation that's expensive in this whole process for inmates who are convicted to death row. Many of those people who end up on death row are not executed and so when you calculate all those variables and you see one who is executed the costs are in the millions because you're factoring in all the costs for these other people that were given a death sentence but actually were not executed.

Q And do you have any idea how much it cost the State of Louisiana to maintain a prisoner for one year?

MR. MARVIN:

Your Honor, we're going to object at this time.

Cost is not relevant. It's just simply not relevant here. He can talk about prison life and all that, but the cost of it is nowhere in the law book. Nowhere in your jury instruction are they to consider cost.

MR. ENGLISH:

Your – Your Honor, this is a capital murder case. Dr. Vigen – The jury is deciding whether or not to impose capital murder – I mean to impose a death penalty in this case. They have – they have two considerations. One is life. One is death. Dr. Vigen has testified that it cost tens of millions of dollars to keep someone on death row. The logical and next question is how much does it cost the taxpayers to keep someone in prison for twenty, twenty-five years or life. That is a reasonable question. I believe it's very relevant to these proceedings. The jury has a right -There's – there's a – there's a lot of evidence put into this case that doesn't go into the –

into the charge sheet, but the jury has a right to know and to hear this information. The D.A. is well ripe to put someone on to counteract what Dr. Vigen may say.

THE COURT:

I'm going to overrule at this time –

MR. ENGLISH:

Thank you.

THE COURT:

– but I'm going to ask that that question –

MR. ENGLISH:

I'll move quickly, Your Honor.

Q Do you have an idea, Dr. Vigen?

A Speaking specifically about Louisiana, recently in 2009 the attorney general who is Buddy Caldwell, who was a former district attorney like Mr. – like Mr. Marvin and Judge Scott is in Caddo, said that to try a second degree murder case is fifteen to $20,000. To try a death penalty case is about $250,000. The average – the budget at Angola is $126 million and they have 5200 inmates. So the average budget is $63.23 a day to maintain an inmate.

Q I'm so bad at math. So $63 a day times 360?

A Let me put it this way. The best study that I've read in this – in this area is California. And it costs $90,000 a year more for California to house a death row inmate than a regular inmate. That's the –

Q And so, simply, and I'm going to move on, you're talking about tens of millions of dollars to house a death row inmate over his life in jail and you're talk-

ing about hundreds of thousands of dollars for someone who is serving life?

A Yes, but it's – it's tens of millions of dollars per execution. That's that figure. That's – You can have 30 or $40 million to execute one person when you consider all the people that – that –

Q I understand.

A So you can't say one person cost that.

Q How – how often is an individual –Do you know how often an individual is executed in Louisiana?

A We have – I think we had an execution in 2009 and I think prior to that it was in – like back in 1999.

Q So it's very rare?

A It's rare in Louisiana.

Q Do you know how many – Do you know how many death row inmates there are right now?

A There are 82 men and two women.

Q And so if you just do the statistics the chances of those 82 people being executed is small?

A Yes. There are – there are men on death row that have been there twenty-plus years. And so I think the average level of time on death row is about twelve and a half years nationally. But in Louisiana I think it would be – it would be greater than that.

Q And if Mr. McCoy receives a life sentence is that a serious punishment?

A Absolutely.

Q You've looked at a lot of death penalty cases in your career?

A Yes, sir.

Q I'm assuming you've seen some pretty gruesome facts?

A I have.

Q Do you believe in the death penalty?

A Well, in certain circumstances I would – if I were a juror I could give the death penalty in a certain – in certain cases, yes.

Q And knowing what you know about – knowing what you know about the cost of death row versus the cost of life, and knowing what you know about what a prisoner on life – in life – with a life sentence has to go through, is – Do prisoners with life ever come to terms with the crimes that they may have committed?

A Oh, yes. Yes.

Q How long does it take?

A Oh, I – I don't know. I may not – I've talked to many older inmates who have very much come to terms with – with the crimes they've committed. So I think the possibility and the – I guess even a probability – I think a high number of them have that I've talked to. And I've not talked to everybody out there who has, but I think it's certainly possible.

Q Do you think life in this case would be appropriate?

A Well, that's – that – I don't – I don't want to answer – I think that's their – their decision not mine.

MR. ENGLISH:

I tender. I'm sorry, just one other question. I apologize, Schuyler. If you'll give me one second.

MR. MARVIN:

Go ahead.

Q How often do governors commute the sentence of inmates on death row?

A I don't know of any in Louisiana in the recent past. Any governor that's commuted –

Q It doesn't happen?

A I don't believe so.

Q In Louisiana?

A I don't believe so.

Q Thank you.

MR. ENGLISH:

I tender.

THE COURT:

Mr. Marvin.

MR. MARVIN:

Thank you.

* * *

[CROSS EXAMINATION OF
DR. VIGEN BY MR. MARVIN]

that he went to some college and him telling someone that he played professional football, and then I heard you say – I wrote it down – something about the possibilities the possibilities in the psychological world, and I wrote or realm, of all of the types of disorders and dysfunctions and things that – that you do in your field, and there are literally hundreds or thousands of them, are there not? That you – that you would start by elim-

inating by saying, well, he doesn't have this, he doesn't have that and you narrowed it down to narcissistic personality disorder, attachment disorder and the third one?

A In the – In the DSM IV there are four hundred diagnostic categories or so. And of those I think he is best understood with the narcissistic personality disorder. But I'm not sure I understand your question.

Q Well, I just heard you testify this morning and briefly this afternoon regarding different types of illnesses and Mr. English was just kind of I think trying to lump them into something and just call it mental disorder. And you were trying to say, well, no, it's a specific illness or a specific type of disorder. Is that right?

A Yes.

Q Okay. What if Robert McCoy is just – just a liar? I mean if I said I played professional football my buddy out there that I'd see in the afternoon is going to say, well, he's just a liar. You know, I don't have narcissistic personality disorder, attachment disorder. I'm just a liar.

A Certainly – Yeah, certainly, you know, we considered to what extent is Mr. McCoy a liar. I mean, first of all, it's – first of all, all of us in this room have lied in our histories. None of us are immune from that. And I would say that if any of us claim that we didn't lie and never have lied, we're lying now. So, all of us lie. I think lying is difficult to detect. And I think Mr, McCoy certainly is not immune from lying. I think he lied to a number of people, especially women, about his accomplishments and so on as a way of enhancing, you know, his personality and maintaining this facade or system of belief that he has about himself. So I – I

would never submit that he's not –he hasn't lied or isn't lying at times about all this.

Q Okay.

A I think that can be very much a component of who he is.

Q All right. And because I – I never heard the word "lie" until now. I was always hearing fabricate, refabricate. But just some people just lie. Some –

A Some –

Q Some people are just mean.

A Some people are mean and some people just lie. That's true.

Q Now, let's talk a minute about – I'm not sure I understood your testimony regarding his guilt, his feeling of guilt. I mean, tell me again – I did not quite understand what you meant by that.

A Well, I guess what I – Mr. Marvin, I was trying to define what I think guilt is, first of all. And I think all that Mr. English has – what I saw in the thread of Mr. English's questions he wanted to know what is guilt and then he wanted to know what are the reasons people attempt suicide. And is one of those reasons they attempt suicide because they have committed some act about which they feel guilty and they want to self punish. And suicide is an aggressive act towards oneself. And I think – I think that was the tenor of his questions.

Q So the suicide attempts, I believe there were four, that you learned about could have been attempted by Mr. McCoy because he felt guilt over all this?

A Could have been, yes.

Q Okay. Okay. Dr. Vigen, just to make the record clear and I

* * *

(ENGLISH – CLOSING ARGUMENT)

MR. ENGLISH:

I told you when this case started that Robert McCoy committed these crimes. I told you in my closing that Robert McCoy committed these crimes. And I asked you at the closing to consider second degree murder. I asked you that when I readily admitted to you in both my opening and my closing that the evidence in this case was overwhelming. And you chose to impose first degree murder. I respect that because I know it wasn't easy. Though what I respect is despite the overwhelming evidence in this case, despite the skill of Schuyler Marvin, our district attorney, as a lawyer, you went back in that room and you deliberated and you asked questions and you wrestled with it. That's all I could ask. As I said yesterday, Gregory Colston, Willie Young, Christine, we demand that they have justice. Civil society is too fragile not to. The family, Yolanda, Pauline, El'iot, I can't imagine – I can't imagine – I can't imagine Yolanda's pain. I don't want to think about it. It's too much for me. And God bless her that she can bear it and come into this courtroom. I've had a tear in my eye for Gregory since this case started. You cannot be affected by it. But the law says, "And justice for all". That's what the law says. And as I told you yesterday that's a tough one for us to live up to. That's a tough one for that – to live up to. Robert McCoy caused the death of those people, but we live in a society that says Robert McCoy has a right to justice that we deem, that you deem appropriate. And

over the last ten days or more, I have given Robert McCoy everything that I have. Judge Cox has given him everything that he has to make sure that he had a fair trial and to make sure that those sweet arms of justice touch him no matter how difficult it is, no matter how repulsed we are by these crimes. The law says Robert McCoy --the law must apply to him. When I sit down from you -- when I sit down from this closing you won't hear my voice anymore. My work will be done. And this heavy, heavy burden will fall to each one of you. And I remind you, you are the judge in this case and you've got to wrestle with some facts and you have to wrestle with some evidence. No matter how -- I'm not telling you -- You have to consider Yolanda, Eric and Pauline and Lorenzo and the coach's testimony. You have to consider the impact that these crimes have had on their life. That's the law. And as human beings I would expect and require you to do no less. But the law says you've got to do what I don't have to do, what Schuyler doesn't have to do, and what this judge doesn't have to do. The law says you have got to try to step outside the emotions, the pain, the ugliness, the revulsion and look at this case and apply the law. And look at this case and make a determination as to whether or not Robert McCoy will spend the rest of his life in jail or whether or not he will be given the death penalty. The State is going to offer -- and they have -- Schuyler has argued that there are aggravating circumstances. I have a duty to challenge him. I have a duty to challenge him. The law requires that I do it and the law requires that you evaluate it. The first is that the offender was engaged in the perpetration of an attempted aggravated burglary. Aggravated burglary is the unauthorized entering of an inhabited dwelling with the specific intent to commit a felony or theft therein if the defendant is armed with a dangerous weapon or

arms himself with a dangerous weapon after entering. There has been no evidence put on in this case that there was an unauthorized entry. There's been no evidence that Robert McCoy kicked the door in, forced his way in, broke a window. The -- the -- the reality of it is no matter how unsettling it is, Robert McCoy went to his in-laws' house. The State failed to meet that burden. Unauthorized entry, that means he had to show that Robert McCoy was in that house against the will of the people that lived there. And you don't get to say, well, he was in the house, they must not have wanted him there. You must make your decisions based on the evidence that came from this chair. And there's been no evidence in this case that Robert McCoy forced his way into that house; that he sneaked into that house against his will. I can't tell you that Robert McCoy knocked on the door and Willie Young opened the door and said, come in, Robert, because we don't know because the evidence wasn't there. But, guess what, I don't have to prove to you that they opened the door and invited Robert McCoy in. He has to prove to you beyond a reasonable doubt that they didn't. And there is no evidence in this hearing -- in this trial to even address that. And aggravated battery is not an aggravating fact in this case. And all I ask you is that you apply the law or the evidence and I remind you, ladies and gentlemen, there's no evidence. The offender knowingly created a risk of death or great bodily harm to more than one person. You have to consider that because that's the facts of this case. It is what it is. Those are the facts of this case. You have to consider that as an aggravating factor. The third one was the offense was committed in an especially heinous, atrocious and cruel manner. The killing of three people is horrible. There's no evidence in this case anyone was tortured. There's no evidence that these deaths were not immediate.

That sounds cold. That sounds cold for me to stand here and tell you, well, the good news for Robert McCoy is he put a gun straight to their head, he killed them and they died right away. But the law says you have to consider that. The law says you have to consider how these people died. And there is no evidence other than Robert McCoy put a gun to their face at close range and he shot them. There's no evidence that they were tortured. There's no evidence that they suffered. There's no evidence that he cut -- he cut any of their body parts off and dismembered them. He -- as ugly as that sounds, as cold as that sounds, he put a gun to their heads and he shot them and he killed them. And as bad as you want to scream and I want to scream and say he killed those people, the law says heinous, atrocious and cruel. The natural argument is there is no cruel way to kill three people and there's not. But the law requires something more than the evidence that was put on in this case. Let me just say something. He had the opportunity to put on that evidence. He didn't because he doesn't have it and it's not before you. And you cannot consider that as an aggravating circumstance. So the one aggravating circumstance that you can consider, that the evidence is undisputable is, is that -- is that more than one person died in this case. The law also says you must consider -- it says even if you find an aggravating circumstance -- and you will find an aggravating circumstance because I readily admit to you and it's undisputable that there was more than one person killed in this case, you must also consider any mitigating circumstances before you decide a sentence of death should be imposed. The law specifically provides certain mitigating circumstances and they are as follows: And the one that I want you -- want to ask you to consider is the offense was committed while the offender was under the influence of ex-

treme mental or emotional disturbance; at the time of the -- at the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law; was impaired as a result of mental disease or defect or intoxication. You heard Dr. Vigen's testimony. It was unchallenged. It was unchallenged that Robert McCoy suffers from a severe emotional and personality disorder. You heard Robert McCoy's testimony from this seat. I told you that Robert McCoy was crazy because I tried to communicate to you in words that we all could understand. But Robert McCoy has some serious mental and emotional issues that impacted on him when he was in that house. I mean as Dr. Vigen testified we don't know what went on in that house. We know that Robert McCoy has serious mental and emotional defects and you heard it from this stand. You saw it. You've seen it in this courtroom since we have been here. This man attempted suicide four times. This man attempted to chew off his arm. I truly believe that there's a part of Robert McCoy that wants you to do what he's not been able to do. Kill him. I believe that -- I believe he wants suicide by proxy. He tried and he's in a controlled environment and he just can't get it done. As offensive as that may be to you, as offensive as that may be to civil society, the law says you must consider this man's mental and emotional state and you must weigh that Robert McCoy has serious emotional and mental illness and it impacted on his decision-making and how he functioned. Dr. Vigen said when you strip it all away there's nothing there. You heard him. You heard him accuse Officer Humphrey of being in a drug conspiracy, of trying to kill him. You make your decision as to whether or not he was in here just fabricating, making up a lie, trying to play on your sympathy. You heard it. You saw it. You heard Dr.

Vigen's testimony. He was credible. Schuyler Marvin says something -- he says all I'm asking you to do in this case is to apply your common sense -- in his opening statement. All I'm asking you in this case is to apply your common sense. Step back from the emotion that you feel, the anger that you feel, the horrendous stomach-turning that you feel, and evaluate Robert McCoy for what he is. And the law says you have to factor that in as a mitigating circumstance in this case. And you have to do that. Yolanda Colston testified today that Robert put a knife to her throat. My only response to that is to say of it is that that was never tested inside of a court. I'm not saying that she's lying. I'm not saying that it's not untrue. I'm saying that Robert McCoy had a -- has a right -- the law says he has a right to be -- there was a warrant out for him. And the law says, "And justice for all". It's tough. It's tough. The law says that those are mere allegations as we speak right now made against Robert McCoy because they have never been brought into this room and they have never been tested and Robert McCoy has never had the opportunity to offend himself -- to defend himself. Listen, these rules we put in place in America are tough. These rules we put in place in this society are tough because we have done what nobody else in the history of the world has done. We've said every individual, no matter how offensive we find him, no matter how he offends our sensibility -- and justice for all. The law must apply to him. Otherwise, it doesn't apply to any of us. That's why it's tough. We have been in this courtroom the last ten days dealing with this ugliness, dealing with this lack of humanity that was committed in this case. To kill a person you can't see his humanity. That's -- that's the common thread. Robert McCoy could not see the victims' case and their humanity. He lost it. I believe his mental illness played a role in it,

played a significant role in it. He lost it. But we, as a civil society -- you, as the twelve judges in this case, I'm asking you to hold on to your humanity. Ladies and gentlemen, there's been too much death in this courtroom. There's been too much -- there's been too much. I got assigned a duty. My duty for you was to stand in front of you and beg for Robert McCoy's life. It's a duty that I don't take shallow. It's a duty that I embrace because that's the duty that I signed up to do. And you have been drawn into this case because society has placed a duty upon you. I ask you to go back into this jury room and to struggle with the facts of this case and to find your humanity, to keep your humanity, to keep our humanity front and center. There's been too much death in this courtroom. I ask you to go back in that room and to grant Robert McCoy mercy. And mercy is given to those who don't deserve it. To be Christ-like is to grant mercy to those who offend us, to those who everybody says they don't deserve mercy. I ask you to do a very difficult thing, to try to step outside the emotions, to try to step outside the need to call for vengeance in all of us and to see Robert McCoy's humanity and to send Robert McCoy to jail for the rest of his natural life. I ask you for mercy knowing and understanding mercy is given to all. I'm not asking for your forgiveness. I'm not asking you to condone this. I'm not asking you to put aside your anger. I'm not asking you to put aside your revulsion. I'm asking you to give Robert McCoy mercy and to send him to jail for the rest of his life even if you believe he's not deserving of it. That is the nature of mercy. And I'm asking you to keep your humanity and our humanity alive in this case and that there be no more killing in this courtroom; there be no more talk of death. It's not going to bring anybody back. As painful -- It's not going to make Yolanda's pain, or Eric's pain, or Pauline's pain go away

because nothing's going to happen in this courtroom that's going to -- that's going to -- that's going to heal that. I find words to be inadequate. I tried to do the best I could. Each one of you said that you understood that you are the judges in this case. Each one of you understood and said that when I go back in this room me and me alone got to judge the facts of this case, and me and me alone got to decide whether or not Robert McCoy lives. And I know you can find it in your heart to keep your humanity and our humanity and to grant Robert McCoy mercy in this case and to send Robert McCoy to jail for the rest of his life. Thank you for your time.

THE COURT:

Mr. Marvin.

MR. MARVIN:

Thank you.

(MARVIN – REBUTTAL ARGUMENT)

MR. MARVIN:

Well, I do respect Mr. English and what he has – what he had to work with here and the hard job that he has and what he's done. But if you notice he tells you one minute to put your emotions aside, but now come crunch time he wants to pull your emotions out. As to his comments regarding that there's no evidence of unauthorized entry, the 911 tape, you heard Christine Colston screaming, asking for help. If that's not evidence that Robert McCoy was in her home without her permission I don't know what else we could bring to you. A video tape maybe is about all. But you hear her voice and tell me that you think she allowed Robert McCoy inside her home. As to his statement regarding Gregory that we produced no evidence that he didn't

die immediately, we produced Dr. Traylor and Dr. Traylor told you about his autopsy and he entered into his evidence his autopsy report that states his cause of death and the death certificate. Both of those accurately state his cause of death as being the sixth, one day later. So, Gregory did not die instantly and that's the proof of it and there is evidence in the record to support that. And as to Mr. English's statement to give Robert McCoy mercy, even give it to the -- he said give it to the ones that don't deserve it, give him what he deserves. Give him what he deserves. Each of you swore to God that you could do the right thing. And the right thing here is the death penalty. Thank you.

* * *

THE COURT:

All right, ladies and gentlemen, when this verdict comes back, please, no outbreak in the courtroom, no outbursts in the courtroom. I will stand at ease until a verdict is rendered.

MR. SHERIFF:

Court is at ease until further notice.

(COURT RECESSES)

(JURY DELIVERS QUESTION TO THE COURT)

(COURT RECONVENES)

THE COURT:

Mr. Marvin, you're present, is that correct, sir?

MR. MARVIN:

Yes, sir.

THE COURT:

We're back on the record. Mr. Marvin is present. Mr. English, you're present?

MR. ENGLISH:

Yes, Your Honor.

THE COURT:

And Mr. McCoy is present?

MR. ENGLISH:

Yes, Your Honor.

THE COURT:

The jury stated they would like to be – to see the newspaper article that the coach wrote and that's signed by the foreperson. And I was just going to send the evidence – It's S-101. Any objection to that, Mr. Marvin?

MR. MARVIN:

* * *

No. 16-8255

IN THE

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ROBERT MCCOY,
Petitioner,

v.

LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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QUESTION PRESENTED

Whether it is unconstitutional for defense counsel to admit an accused's guilt to the jury over the accused's express objection.

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IN THE

Supreme Court of the United States

No. 16-8255

ROBERT MCCOY,
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v.

LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

INTRODUCTION

The constitutional right at the heart of this case is one so central to our justice system that it rarely requires explication: a criminal defendant's right to decide whether to admit guilt or instead to pursue acquittal and require the prosecution to prove his commission of the offense beyond a reasonable doubt. That choice is the defendant's core entitlement, without which none of the procedural protections the Constitution guarantees the defendant in a criminal prosecution has genuine meaning. A trial in which the defendant is deprived of this core right is no trial at all.

Robert McCoy made it clear beyond any doubt, both to his lawyer, Larry English, and to the trial court, that he chose to defend against the charges and *not* to admit guilt. Yet, over McCoy's express objection, the court permitted English to tell the jury that

McCoy had in fact committed the acts for which he was on trial. With the court's approval, English assured the jury that his "client committed three murders" and told them that he "took that burden [of proof beyond a reasonable doubt] off of" the prosecutor. JA509, JA647. He told the jury, "I've just told you he's guilty." JA510. McCoy was convicted on that basis notwithstanding his unflagging protestations of innocence—which never received any genuine hearing—and sentenced to death.

The Louisiana Supreme Court concluded that English made a reasonable strategic decision to admit McCoy's guilt and thereby supposedly improve McCoy's chance of receiving a life sentence rather than death. But that is the wrong inquiry. It is irrelevant whether an admission of guilt might have been reasonable trial strategy. Once McCoy communicated his contrary decision, that choice was not English's to make.

Under the Sixth Amendment, "the right to defend is personal." *Faretta* v. *California*, 422 U.S. 806, 834 (1975). It is the accused's life and liberty, not the lawyer's, at stake. And it is the accused's defense. The lawyer merely assists the accused in making it. This Court has repeatedly recognized "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017). It is the defendant's right to make certain basic decisions that shape his defense, including whether to defend himself or to obtain counsel, whether to go to trial or enter a plea, and whether to testify or stand on his right to remain silent. The defendant is likewise entitled to decide whether he will admit guilt in the hope of securing a lesser sentence or seek acquittal—as is his right—and require the prosecution to prove his guilt. The defendant does not waive that core

entitlement by accepting the "Assistance of Counsel for his defence." U.S. Const. amend. VI.

Here, where McCoy expressly and insistently informed his counsel and the court that he was innocent and did not want to admit guilt, counsel was not entitled to overrule that decision and tell the jury McCoy was guilty. The court's error in allowing counsel to do so requires a new trial.

OPINIONS BELOW

The Louisiana Supreme Court's opinion (JA31-209) is reported at 218 So. 3d 535. The Order denying rehearing is available at 2016 La. LEXIS 2485.

JURISDICTION

The Louisiana Supreme Court entered judgment on October 19, 2016, and denied rehearing on December 6, 2016. The petition for certiorari was filed on March 6, 2017. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

A. Pretrial Proceedings

On May 5, 2008, Christine and Willie Young and Gregory Colston were shot and killed in their home in Bossier City, Louisiana. The victims were the mother, stepfather, and son of Robert McCoy's estranged wife, Yolanda. Police arrested McCoy several days later in Idaho. McCoy was extradited to Louisiana, where he was appointed counsel from the public defender's office. R1324.[1] A Bossier Parish grand jury indicted McCoy on three counts of first-degree murder, R3, to which he pleaded not guilty, R1329. The prosecution gave notice of intent to seek the death penalty. R8.

At defense counsel's request, the court appointed a sanity commission to evaluate McCoy's "present mental condition" and his "mental capacity at the time of the alleged offense." R9, R11. A psychiatrist and a psychologist appointed by the court examined McCoy and concluded that he was competent to stand trial and that, at the time of the alleged offense, he was able to distinguish right from wrong. JA210-211, JA225-226, JA293-295. At a November 2008 hearing, the court reviewed and accepted both reports and determined McCoy was competent. JA293-295. During the course of their appointment, McCoy's public defenders filed no other motions on his behalf except for a two-page boilerplate discovery motion.

From the time he was arrested until the present, McCoy has consistently maintained his innocence of the offense. He maintains that he was out of state at the time of the killings and that he believes corrupt police

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[1] Citations of "R__" refer to documents in the Corrected Record on Appeal that do not appear in the Joint Appendix.

officers killed the victims when a drug deal went wrong. In support of that defense—and in the absence of any filings by his public defenders—McCoy filed *pro se* a notice of intent to raise an alibi defense and several subpoena requests for witnesses who he believed had knowledge of the police's involvement in the crime or could confirm his alibi. *See* JA227-231; R32, R45, R49, R1401-1402.

In December 2009 and January 2010, McCoy reported to the court that his relationship with his counsel had broken down, in part because the public defenders refused to support his subpoenas for witnesses at trial, and that he wished to represent himself until new counsel retained by his family could make an appearance. JA302; R49-51. McCoy repeated that request at a February 2010 hearing, stating that he expected retained counsel to appear in time for the May 2010 trial, but that he wished to represent himself in the meantime and would continue to do so if retained counsel could not appear. JA310-327. McCoy stated that he wished to represent himself so that he could oppose the prosecution's motion to quash his subpoenas—a motion the public defenders indicated that they would not oppose. *Id.* After a *Faretta* colloquy, the court granted the request, finding McCoy had knowingly and voluntarily waived his right to counsel and was competent to represent himself at trial with a public defender as standby counsel. *Id.*

In March 2010, Larry English, who had been engaged by McCoy's parents, enrolled as McCoy's counsel. JA328-331; R138. English adopted all of McCoy's *pro se* motions, except for his motion for speedy trial, JA328, and requested a continuance of the trial date, which the court denied, R1430. English sought interlocutory review of the denial, but failed to

file the proper paperwork. The intermediate appellate court rejected the filing. R154.

English subsequently asked again for a continuance because he was "having trouble ... putting together a legal team to represent Mr. McCoy," and was "still not up to speed or nearly ready to undertake the representation." JA332-333. The judge warned that if he granted the continuance, English "w[ould] not be allowed to withdraw," JA335, and English agreed, *id.* The court granted the continuance and rescheduled trial for February 2011. JA336.

As English later testified, McCoy "adamantly maintained his innocence" throughout English's representation of him. JA284. English was "certain that [McCoy] truly believed that he was out of state at the time of the crime and that law enforcement and others were conspiring against him." JA285-286. English also confirmed that McCoy was adamant about going to trial and resisted any delay. JA288. Several months after English enrolled, and in the absence of any filings by English, McCoy made *pro se* filings to develop his alibi defense, including three additional requests for witness subpoenas. R190-191, 218-220, 324-325. English did not support those subpoenas. At a January 4, 2011 hearing, English told the judge that he believed McCoy was "suffering from some severe mental and emotional issues that ha[ve] an impact upon this case," and that he would not adopt McCoy's *pro se* filings. JA347; *see also id.* ("if [McCoy] wants to argue them, he can argue them"). English did not ask to revisit McCoy's competence to stand trial.

At a hearing on January 24, 2011, McCoy again complained that English "w[ouldn't] subpoena people ... that w[ould] validate [his] innocence," including

witnesses who allegedly had knowledge of the police collusion and his relationship with his estranged wife, as well as an alibi witness who would testify that McCoy was in Houston on the night of the killings. JA393, 395, 398-399. English confirmed that he would not subpoena the witnesses McCoy wanted. JA388-389. He again told the court that he believed McCoy had "severe mental issues" and was "irrational" and was asking English to do things that were "counter [to] what [McCoy's] interests are in this trial." *Id.* English told the court he believed he had "an ethical duty to this man not to follow his bizarre behavior." JA397.

With trial approaching, English requested a further continuance, which the court denied. On English's application for supervisory writ—filed the day before jury selection was to commence—the intermediate appellate court "reluctantly" ordered a continuance, out of concern that even at that late date, nearly a year after English's engagement, "evidently no work had been done in this capital case to develop [mitigating] evidence." R439-440.

Trial was rescheduled for July 28, 2011. JA424. By that time, English had come to believe the evidence against McCoy was "overwhelming" and sought to negotiate a plea agreement for a life sentence. JA286. About one month before trial, English "confronted Mr. McCoy," telling him English "believed that [McCoy's] case could not be won and that [McCoy] needed to take a plea." *Id.*; JA436. McCoy "rejected that outright." JA436.

On July 12, 2011, the court held a hearing on the prosecution's motion to quash McCoy's *pro se* subpoenas. At the hearing, English told the judge—contrary to McCoy's expressed wishes—that the defense "had no

alibi evidence in this case" and that he "d[id] not adopt any of the subpoenas that Mr. McCoy has filed" and "w[ould] not call those witnesses if they are subpoenaed." JA434-436, JA441. English told the court he "believe[d] that Mr. McCoy is insane even though the doctors have found him to be legally sane." JA436. English said McCoy was "not ... capable of helping [English] defend his life"—though, once again, English did not seek to revisit the competency determination—and said he believed he "ha[d] an ethical duty to Mr. McCoy that goes beyond whether or not to follow Mr. McCoy's advice." *Id.*; JA441. For his part, McCoy attempted to defend his subpoenas and complained to the judge that English was trying to "undermin[e]" him because English "d[id] not want [him] to present a defense ... when [he] ha[d] a defense to be presented":

> In order to have a probable defense for myself, Your Honor, I have to have my ... witnesses that I need to validate my defense. ... I'm going to maintain my innocence, Your Honor. ... I've got a right to face my accusers ... . And that is—that's what I'm going to do.

JA438-439.

Immediately after the hearing—with just sixteen days left before trial—English met with McCoy and told him, for the first time, that English intended to admit to the jury that McCoy had killed the three victims. JA286. As English later testified, McCoy was "furious" and "completely opposed to ... telling the jury that he was guilty of killing the three victims and telling the jury he was crazy." JA286-287. McCoy "told [English] not to make that concession, but [English] told him that [he] was going to do so" anyway because English "believed that this was the only way to save

[McCoy's] life" and "felt [he] had an ethical duty to save [McCoy's] life, regardless of what [McCoy] wanted to do." *Id.* English dismissed McCoy's profession of innocence as "delusion[al]," believing that McCoy was "insane and ... not competent to be tried" and could not "deal rationally with the evidence of his guilt." JA288-289. English "ended the meeting as it was becoming too intense." JA286.

That meeting essentially ended the professional relationship between English and McCoy, as McCoy came to see English "not as his lawyer but as his enemy—part of the system that was conspiring to convict him of a crime he believed that he had not committed." JA286. Right after the meeting, McCoy tried to terminate English. He called his parents several times over the next two weeks to enlist their help arranging substitute counsel, and McCoy's father assured him that substitute counsel had been arranged and would be at court. R963-964, 966-973, 977, 983-986, 988, 1053-1054, 1062, 1069-1071, 1075, 1080-1081, 1083-1084, 1089, 1090-1093, 1096-1097, 1104, 1109-1110. McCoy's parents, who had originally hired English, told English that he was terminated, and they wrote a letter to the court, which they gave to the District Attorney's office, requesting English's removal. JA291-292. When English visited McCoy shortly before the next scheduled hearing, McCoy told English that he had been terminated and that substitute counsel had been arranged and would appear at the hearing. JA286-287.

A hearing on the matter was held two days before trial. McCoy told the court he wanted to terminate English, explaining that English had "not investigated anything," JA450, and had sought to turn McCoy's alibi witness against him:

> [T]his is my life, Your Honor. ... I need somebody that's going to work for me, not somebody that's going to ... work for the prosecutor .... This is a very vital time in my life, Your Honor, and I need help. I don't need somebody that's working against me, Your Honor. And he's worked against me every step of the way.

JA456. McCoy told the court that his parents had retained two substitute lawyers to take over for English. JA457. Despite having been discharged, English did not move to withdraw, but did ask to be "relieved" if McCoy "secured substitute counsel." JA458.

The court denied as untimely McCoy's request to terminate English and noted that the substitute lawyers had not appeared in the courtroom. JA460-461. At that point, McCoy asserted his right to represent himself. JA465. The court cut him off and denied that request as untimely because McCoy "ha[d] not made that known to the Court unequivocally before this date." *Id.* The court instructed McCoy that "from th[at] day forward" he "would not be allowed" to address the court "except through Mr. English." JA464.

English then told the court that McCoy "insist[ed] that [English] put forward a defense in this case at the guilt phase," but that English had "made a determination ... that the evidence in this case is ... overwhelming against Mr. McCoy." JA468-469. The court told English:

> [Y]ou are the attorney, sir. ... And you have to make the trial decision of what you're going to proceed with.

JA469.

B. Trial

Voir dire began on July 28, 2011. The State exercised peremptory challenges against four of the five qualified African American jurors, and English raised challenges under *Batson* v. *Kentucky*, 476 U.S. 79 (1986), which the court rejected. *E.g.*, R3114-3127; R3196-3202.

In English's opening statement—during which he referred to himself as the "district attorney," JA509—he told the jury that "[t]here is no way reasonably possible that you can listen to the evidence in this case" and not conclude that McCoy was "the cause of these individuals' death." JA504. He told the jury that McCoy was "so wracked with guilt about this case that he has attempted to kill himself six times," and he said the "evidence is overwhelming that Mr. McCoy caused the death of these people"—indeed, he told the jury, "I've just told you he's guilty." JA509-510; *see, e.g.*, *id.* ("my client committed three murders ... the evidence ... will say that he did it").

Part way through English's opening, McCoy objected and asked to be excused from the courtroom. JA504-507. Outside the presence of the jury, he told the judge that English was "simply selling [him] out," JA 505:

> I tried to get Mr. English removed, Your Honor, and you still kept Mr. English on my case, Your Honor, when I told you Mr. English was not putting up any type of defense for me. He's sitting there vindicating, Your Honor, that I murdered my family. I did not murder my family, Your Honor. I had alibis of me being out of state. Your Honor, this is unconstitutional for you to keep my attorney on my case when this attorney is completely selling me out.

JA506. The judge repeated his order to McCoy that "Mr. English [wa]s representing [him]," warned McCoy not to make any statements in front of the jury, and allowed English to finish his opening. JA505-508.

The sole defense theory English presented in his opening was that McCoy lacked the mental capacity to form specific intent, as was required for first-degree murder. JA504-505, JA508-512. He told the jury that even though McCoy had been judged competent to stand trial, McCoy was "crazy" and that the case was therefore "a second degree murder trial ... not a first degree murder trial." JA504-505, JA509.

In fact, as the prosecutor later told the jury, this diminished-capacity defense was legally baseless. In Louisiana, second-degree murder and first-degree murder are both specific-intent crimes, so English's argument could not support a conviction of second-degree rather than first-degree murder. JA652-654. Moreover, as the Louisiana Supreme Court later noted, English's argument was also foreclosed because Louisiana does not recognize a diminished-capacity defense independent of an insanity plea. Under "well-settled" Louisiana law, evidence of a mental defect that does not establish legal insanity cannot negate the requisite intent to commit a crime or reduce the degree of the offense. JA92 n.35. And McCoy had never entered any notice of intent to plead not guilty by reason of insanity.

Trial proceeded. Through eleven witnesses, the prosecution presented evidence that: on the 911 call made from the victims' home, the caller could be heard addressing another person in the house as "Robert," R3294; the three victims in the house were killed by gunshot wounds to the head, R3349-3350, R3353-3365; the white Kia that police pursued fleeing the area of the

crime was registered to McCoy and his estranged wife, R3377; a dashboard camera showed an unidentified black male running from the Kia, R3284-3285; a search of the Kia revealed personal items belonging to McCoy, a cordless phone that had been removed from the victims' house, and a Walmart bag and receipt for the purchase that day of .380 caliber ammunition, R3288; Walmart video footage showed an individual buying ammunition, whom a detective identified as McCoy, R3383; a detective tracked McCoy using cellphone records and by speaking to truck drivers, leading to McCoy's arrest while hitchhiking in a truck in Idaho, R3371-3383; and a .380 caliber pistol was found behind McCoy's seat in the truck, which matched the bullets retrieved from the victims R3393, R3434-3440.

Although English had already admitted that McCoy killed the victims, he did ask questions written out by McCoy of some of the prosecution's witnesses—but only because, as he repeatedly told the jury, McCoy asked him to. *See* JA515 ("I have just a few questions for you Mr. McCoy wants me to ask you."); JA517 ("I have a couple of questions—actually, Mr. McCoy wanted me to ask you a couple of questions"); JA524 ("Mr. McCoy has asked me to ask you some questions."); R701. Those questions highlighted the following facts: the 911 dispatcher could not be certain that the "Robert" referenced on the 911 call was Robert McCoy, JA514; the officer who pursued the white Kia could not identify the fleeing driver in the video footage as McCoy, JA513; although a detective identified the individual in the Walmart video footage as McCoy, the testifying Walmart employee could not identify that individual, R3340; and the seized gun was not tested for fingerprints or DNA, JA525, JA556. English used his own cross-examination of two other witnesses to elicit

testimony detrimental to McCoy—namely, hearsay testimony that McCoy had attempted suicide following his arrest, JA520-521, JA522-523, JA555, which directly contradicted McCoy's denial that he had ever attempted suicide, *e.g.*, JA608-609, JA612-620.

McCoy took the stand in his own defense. JA568-638. McCoy maintained his innocence, *e.g.*, JA601, JA607, testifying that he was in Houston at the time of the killings and that he had an alibi witness, whom English had neither interviewed nor subpoenaed, JA597-598. He explained that police had taken his car prior to the shootings, JA589-591, and that a friend had use of his cell phone at the relevant time, JA579-582. He testified that he believed corrupt police officers were selling drugs and had killed the three victims during a "drug deal gone bad" and were trying to cover it up. JA584-588. And he testified that the gun found when he was arrested in Idaho had not been retrieved from his person and had not been tested for DNA or fingerprints because the police had already decided whom they were going to "try to put it on." JA611.

English used his examination of McCoy to impeach his own client, including by asking several questions about McCoy's supposed suicide attempts after the shootings. JA612-619. English also made statements during his questioning that directly undercut McCoy's defense. For instance, even though no prosecution witness had identified McCoy as the individual in the video footage of the driver fleeing the white Kia, English asserted that McCoy was indeed the individual in the footage and asked McCoy to acknowledge that he "physically resembled" the person in the video. *See* JA513, JA588-589, JA592. And English referred to inculpatory evidence the prosecution had not introduced, including call records for a phone that was allegedly in

McCoy's possession the night of the killings, JA579-580, JA598. English called no other witnesses.

In his closing argument, English again admitted that McCoy had killed the victims and told the jury that he had removed the prosecution's burden of proof:

> I ... told you that after you saw the evidence in this case no reasonable person could come to any other conclusion than Robert McCoy was the cause of these people's deaths. So, I took that burden off of Mr. Marvin [the district attorney]. I took that burden off of you. And the evidence said what Mr. Marvin said it was going to be and it said what I told you it was going to be.

JA647. Directly contradicting his client's testimony, English stated that "McCoy ... believes that he was in Houston, Texas, when the evidence is overwhelming that he was in Bossier City." JA649. Again, the sole defense English presented was the legally unavailable defense that McCoy suffered from diminished mental capacity and should therefore be convicted only of second-degree murder. JA647-651.

On rebuttal, the prosecution explained that under Louisiana law, second-degree murder (as well as the lesser included offense of manslaughter) also requires specific intent. As a result, a lack of specific intent would not provide a basis to convict McCoy of second-degree murder or manslaughter rather than first-degree murder. JA652-654.

The jury was instructed that it could find McCoy guilty of first-degree murder if it was satisfied that McCoy committed the shootings with the specific intent to kill or cause great bodily harm to more than one

person. The jury was further instructed that, if it was not convinced that McCoy was guilty of first-degree murder, it could consider verdicts of second-degree murder or manslaughter or a verdict of not guilty. R635-641. English did not request, and the jury was not given, any instruction that would have allowed it to apply his defense theory. Thus, the jury was not instructed on any offense that did not require specific intent, and the court gave no instruction on the diminished-capacity defense. R632-641.

After submitting several questions to the court during deliberations and reviewing certain items of evidence, the jury returned a unanimous verdict of guilty of first-degree murder on all three counts. R623, R625, R627. After hearing the verdict, McCoy told the court he had been "railroad[ed]" and "totally ... set up" because English "didn't subpoena any of [his] witnesses" and "ha[d] not d[one] anything ... to vindicate [his] innocence." JA661-665.

During the penalty phase, the prosecution called five witnesses. Although English's strategy had purportedly focused on mitigating McCoy's sentence, English in fact called no mitigation witnesses. The sole witness he did call, Dr. Mark Vigen, the court-appointed psychologist who had earlier found McCoy competent to stand trial and had opined that McCoy had the ability to distinguish right from wrong, undercut English's own theory of mitigation. English's penalty-phase argument focused on the mitigating circumstance that "at the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" was "impaired." JA755. Nonetheless, he prompted Dr. Vigen to tell the jury that McCoy was mentally competent to stand trial and that there was "no evidence to

suggest that [McCoy] had a mental illness that would interrupt his ability to know right from wrong regarding the ... murders he's been convicted of." JA689, JA704. Rather than presenting any evidence that might have been mitigating, under English's questioning, Dr. Vigen offered a dehumanizing portrait of McCoy that could only have encouraged the jury to sentence him to death. Dr. Vigen told the jury that McCoy "has a narcissistic personality disorder," JA706, and that he lied about his background, JA699, JA702-703, and "transforms, rewrites, refabricates his view of himself ... to maintain his self image," JA692. After "strip[ping] away all those lies," Dr. Vigen opined, "there's nobody there." R3704. McCoy was only a "shell where there's no inner—inner core personality. There's no real self inside." JA730.

During its deliberations, the jury sent several questions to the court, including an inquiry as to the "time limit until [it is] considered a deadlocked jury." R3737. Eventually, the jury returned three death verdicts.

C. Decision Under Review

Represented by new appointed counsel, McCoy moved for a new trial. R842. Presenting both a declaration and live testimony from English, McCoy argued that the trial court had violated his constitutional rights by permitting English to proclaim McCoy's guilt to the jury over his express objection, and that English's actions constituted ineffective assistance of counsel under *United States* v. *Cronic*, 466 U.S. 648 (1984). The motion was denied. McCoy renewed those arguments on direct appeal, and the Louisiana Supreme Court affirmed.

The court rejected McCoy's argument that he had the right to instruct English to defend against the charges rather than admit his guilt. JA78-87. The court reasoned that, under *Nix* v. *Whiteside*, 475 U.S. 157 (1986), counsel must comply only with "the client's *lawful* instructions." JA81. It opined that the "alibi defense [McCoy] wanted Mr. English to put on, but which could not be substantiated, had no reasonable chance of success, but exposed those who attempted such a defense to the charge of perjury." JA83. And the court observed that English had an ethical obligation not to assist McCoy in "'conduct that the lawyer knows is criminal or fraudulent.'" JA80 (quoting Louisiana R. of Prof. Conduct 1.2(d)). Attaching no constitutional significance to McCoy's objection, the court further reasoned that "[c]onceding guilt, in the hope of saving a defendant's life at the penalty phase, is a reasonable course of action" and that the "court does not sit to second guess strategic and tactical choices made by trial counsel." JA84, JA86.

The court also held that English's admission over McCoy's objection did not constitute ineffective assistance of counsel under *Cronic*. JA87-96. Relying on this Court's decision in *Florida* v. *Nixon*, 543 U.S. 175 (2004), the court held that English "did not completely abdicate the defendant's defense," but "advanced what he saw was the only viable course of action." JA90. The court further noted that English cross-examined some witnesses and raised a *Batson* claim. JA91. The court deemed English's strategy "reasonable," JA95, despite acknowledging that English's diminished-capacity theory was in fact foreclosed by Louisiana law, JA92 n.35.

SUMMARY OF ARGUMENT

I. When the accused in a criminal proceeding chooses to defend against the charges rather than admit guilt, the Constitution does not allow his lawyer to override that choice and tell the jury, over the client's express objection, that the client is guilty. The irreducible guarantee of the Sixth Amendment, reflected in its text and in its common-law origins, is the defendant's right to make the basic decisions regarding the objectives of his defense—including the decision whether to admit guilt or to defend against the charges and insist that the prosecution prove its case beyond a reasonable doubt. As this Court has long recognized, it is the accused's liberty—and, in capital cases, his life—at stake in a criminal prosecution. It is "[t]he defendant, and not his lawyer or the State, who will bear the personal consequences of a conviction," *Faretta* v. *California*, 422 U.S. 806, 834 (1975), and it is therefore the accused who must have the ultimate authority to decide whether to admit guilt.

Florida v. *Nixon*, 543 U.S. 175 (2004), on which the Louisiana Supreme Court relied, is not to the contrary. There, this Court considered whether the Constitution bars defense counsel from conceding a capital defendant's guilt at trial "when [the] defendant, informed by counsel, neither consents nor objects." *Id.* at 178. The Court held that when counsel consults with the defendant "and the defendant is unresponsive," no "blanket rule demanding the defendant's explicit consent" bars counsel from conceding guilt in the hope of securing a more lenient sentence. *Id.* at 192. *Nixon* simply does not speak to the very different question presented here, where McCoy *did* object to any admission of guilt and counsel and the court knew it, yet proceeded with a

trial in which McCoy's own representative affirmatively asserted his guilt to the jury.

Nor did counsel have any ethical obligation to admit his client's guilt, as the Louisiana Supreme Court suggested. To the contrary, ethics rules—as well as the Constitution—bar counsel from doing so over the client's objection. Counsel could and should have put the prosecution to its proof.

The only possible remedy for the constitutional violation in this case is a new trial. By allowing counsel to proclaim McCoy's guilt to the jury over his objection, the trial court stripped McCoy of the right to decide whether to admit guilt or defend against the charges and completely changed the adversarial framework of the proceeding. Rather than requiring the prosecution to prove McCoy's guilt beyond a reasonable doubt, counsel vouched for his own client's culpability and expressly relieved the prosecution of its burden. That was structural error, for multiple reasons. Like a failure to let a defendant represent himself, the trial court's error deprived McCoy of the basic control over his own defense that the Sixth Amendment guarantees, and it is thus irrelevant whether that error "harmed" McCoy's defense. Like a failure to let a defendant choose his own counsel, the error infected the framework of the proceedings so broadly that its consequences are necessarily indeterminate. And like a failure to instruct the jury on the correct burden of proof, an admission of guilt and failure to hold the prosecution to its burden over the client's objection deny a defendant the elemental right to be heard on his claim of innocence. *See Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017).

II. What happened here violated McCoy's constitutional right to make the most fundamental choices regarding whether, and how, to defend his life and liberty. It is thus not properly analyzed as a question of ineffective assistance of counsel. Even if it were, however, this case would fall into the category of cases in which there was such a breakdown of the adversarial process that prejudice must be presumed. *See United States* v. *Cronic*, 466 U.S. 648 (1984). By admitting guilt over his client's express objection, counsel "fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659. And counsel also eviscerated many of McCoy's other constitutional rights that inhere in a criminal trial. When counsel affirmed McCoy's guilt, it rendered his right against self-incrimination meaningless. And when McCoy testified to try to counteract counsel's proclamation of his guilt, counsel cross-examined his own client. Rather than defend his client, counsel effectively acted as a prosecutor. McCoy is entitled to a new trial.

ARGUMENT

I. THE TRIAL COURT'S DECISION TO PERMIT ENGLISH TO ADMIT GUILT OVER MCCOY'S EXPRESS OBJECTION VIOLATED MCCOY'S CONSTITUTIONAL RIGHTS AND REQUIRES A NEW TRIAL

A. Counsel May Not Override A Client's Decision Whether Or Not To Admit Guilt

The Constitution does not permit what happened here: a trial in which, over the defendant's vehement objection and assertion of innocence, the court permitted defense counsel to tell the jury that his client was guilty. The accused alone has the right to choose whether to admit guilt or to defend against the charges.

Where, as here, the defendant has clearly and expressly chosen not to admit guilt, but to hold the prosecution to its burden to prove its case beyond a reasonable doubt, defense counsel may not override that decision.

1. The Sixth Amendment guarantees the accused in a criminal proceeding the right to have "the *Assistance* of Counsel for *his* defence." U.S. Const. amend. VI (emphasis added). It "does not provide merely that a defense shall be made for the accused; it grants to the accused *personally* the right to make his defense." *Faretta* v. *California*, 422 U.S. 806, 819 (1975) (emphasis added). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Id.* at 819-820 (footnote omitted). This Court has long recognized that because the accused's liberty—and in capital cases, the accused's life—is at stake in a criminal prosecution, the accused must have the ultimate authority to control the objectives of his defense.

It is for that reason that the defendant has the right to conduct his own defense at trial, provided he is competent to do so and makes the choice knowingly and intelligently. *Faretta*, 422 U.S. at 819-821; *see also Indiana* v. *Edwards*, 554 U.S. 164, 170, 174 (2008); *McKaskle* v. *Wiggins*, 465 U.S. 168, 170 (1984). That right is not merely ancillary to the goal of assuring a fair or accurate trial; it reflects the accused's indefeasible prerogative to make the fundamental choices that will shape his own fate. Accordingly, a criminal defendant may defend himself even if doing so would make conviction more likely, because "[t]he defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his

advantage," and "his choice must be honored out of that respect for the individual which is the lifeblood of the law." *Faretta*, 422 U.S. at 834 (quotation marks omitted).

For similar reasons, the Sixth Amendment right to counsel embraces the right to one's counsel of choice for defendants who retain counsel. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). That right, too, is an aspect of the defendant's entitlement to make basic decisions regarding the defense of his life or liberty, and is not merely subordinate to the broader right to a fair trial. "The Sixth Amendment right to counsel of choice ... commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel *he believes to be best*." *Id.* at 146 (emphasis added).

Likewise, the Sixth Amendment encompasses the defendant's right to "take the witness stand and to testify in his or her defense." *Rock* v. *Arkansas*, 483 U.S. 44, 49 (1987). "[T]he structure of the [Sixth] Amendment" "necessarily implie[s]" that right because the "accused's right to present his own version of events in his own words" is "fundamental to a personal defense." *Id.* at 52 (quotation marks omitted). The choice whether to testify or to insist on the right against self-incrimination is a choice for the defendant, to be made "in the unfettered exercise of his own will." *Brooks* v. *Tennessee*, 406 U.S. 605, 610 (1972) (quotation marks omitted); *see Rock*, 483 U.S. at 53 n.10.

The right of a competent defendant to decide whether to admit guilt at trial in the hope of securing a lesser sentence or to pursue acquittal and hold the prosecution to its burden of proof is likewise essential to the personal defense guaranteed by the Sixth

Amendment. It is the defendant who faces the consequences of an admission, and he must thus be entitled to choose whether to invite those consequences. "The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *In re Winship*, 397 U.S. 358, 363 (1970). An admission of guilt creates a certainty of conviction and loss of liberty, even if it might potentially result in a lesser sentence. That gamble is the defendant's to make. "[T]he dignity and autonomy of the accused" turn on his right to make these deeply personal decisions. *McKaskle*, 465 U.S. at 177.

2. A defendant is not required to abandon his entitlement to make these basic choices regarding the protection of his life and liberty as a condition of exercising his right to the assistance of counsel. Counsel is a "defense tool[] guaranteed by the [Sixth] Amendment," to be "an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally." *Faretta*, 422 U.S. at 820.

A defendant is likely to benefit from having counsel because "even the intelligent and educated layman" may "lack[] both the skill and knowledge adequately to prepare his defense." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). "[A]ccess to counsel's skill and knowledge" may thus be "necessary to accord [a] defendant[] the 'ample opportunity to meet the case of the prosecution' to which [he is] entitled." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984) (quoting *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275 (1942)). When a defendant chooses to accept "the guiding hand of counsel," *Powell*, 287 U.S. at 69, however, he does not

relinquish the right to determine whether he will admit guilt at trial or instead defend against the charge. The Counsel Clause provides the defendant "with *assistance* at what, after all, is his, not counsel's trial." *McKaskle*, 465 U.S. at 174 (emphasis in original). "[A]nd an assistant, however expert, is still an assistant." *Faretta*, 422 U.S. at 820. The accused thus retains "the ultimate authority to make certain fundamental decisions regarding the case," including "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *see Gonzalez* v. *United States*, 553 U.S. 242, 250-251 (2008). Otherwise, "the right to make a defense [would be] stripped of the personal character upon which the [Sixth] Amendment insists." *Faretta*, 422 U.S. at 820.

"It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas" without first obtaining the client's express consent. *Faretta*, 422 U.S. at 820. As a matter of "practical necessity," counsel must have "control of trial management matters" to ensure that the adversary process functions effectively. *Gonzalez*, 553 U.S. at 249 (citing *Taylor* v. *Illinois*, 484 U.S. 400, 418 (1988)). Those matters—decisions such as "what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence," *id.* at 248—"reflect[] considerations more significant to the realm of the attorney than to the accused," *id.* at 253. They draw upon "the expertise and experience that members of the bar should bring to the trial process," and "can be difficult to explain to a layperson." *Id.* at 249. Requiring the defendant to give formal and express consent to all of

these choices "would burden the trial process, with little added protection for the defendant." *Id.* at 253.[2]

The decision to admit guilt and forgo the chance of acquittal falls nowhere near that category of decisions. The decision whether to admit guilt turns not only on a strategic assessment of the likelihood of a particular outcome in light of the evidence, but also on the value the defendant personally places on maintaining a hope of freedom—unlikely though it may be—relative to accepting a certainty of imprisonment. *Cf. Lee* v. *United States*, 137 S. Ct. 1958, 1968-1969 (2017) (recognizing that a defendant might reject a plea and prefer "taking a chance at trial" despite "[a]lmost certain[]" conviction). It is the defendant who will lose his liberty or face the executioner. And it is the defendant who will face the opprobrium of admitting guilt to a capital

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[2] Even as to decisions counsel may make without the client's express prior approval, this Court has only once approved an action of counsel that overrode the defendant's express instruction. 3 LaFave et al., *Criminal Procedure* §11.6(a), at 905 n.32 (4th ed. 2015); *cf. Gonzalez*, 553 U.S. at 253 ("We do not have before us, and we do not address, an instance where ... the party by express and timely objection seeks to override his or her counsel."). In *Jones* v. *Barnes*, 463 U.S. 745 (1983), appellate counsel briefed only some of the arguments the defendant had requested. The Court held that the defendant had no right to insist that counsel raise every argument because counsel's constitutional duty to "'support his client's appeal to the best of his ability'" permitted counsel to focus on the strongest arguments. *Id.* at 754 (quoting *Anders* v. *California*, 386 U.S. 738, 744 (1967)). But even there, counsel did not act contrary to the defendant's ultimate objective, and the Court did not suggest that counsel could have conceded the conviction was valid or refused to appeal despite the defendant's instruction. To the contrary, a defendant may "instruct[] his counsel to file an appeal," *Roe* v. *Flores-Ortega*, 528 U.S. 470, 486 (2000), and even if counsel believes the appeal frivolous, counsel must follow the appropriate procedures to ensure he does not "brief the case against his client," *Anders*, 386 U.S. at 745.

offense, reserved for the "narrow category of the most serious crimes." *Kennedy* v. *Louisiana*, 544 U.S. 407, 420 (2008). Nothing could be more fundamental, and more important to the capital defendant's life and liberty, than the decision whether to admit guilt and potentially accept life imprisonment. Like the choice whether to represent oneself or the choice whether to testify, the choice whether to admit guilt necessarily belongs to the defendant personally, not to counsel. And once the defendant has made that choice, counsel may not override it.

3. The Framers of the Sixth Amendment would unquestionably have understood the Counsel Clause to forbid counsel from incriminating a defendant against his will. At common law, "it was not representation by counsel but self-representation that was the practice in prosecutions for serious crimes." *Faretta*, 422 U.S. at 823; *see also Powell*, 287 U.S. at 60-61. The defendant was required to plead and prove all affirmative defenses and mitigation defenses; "indeed, 'all ... circumstances of justification, excuse or alleviation' rested on the defendant." *Patterson* v. *New York*, 432 U.S. 197, 202 (1977) (quoting 4 Blackstone, *Commentaries on the Law of England* *201). The defendant personally had the right—and obligation—to decide whether to admit his guilt to the jury or to defend against the prosecution's case. In cases where the defendant was entitled to counsel, counsel's role was limited to debating points of law. 4 Blackstone, *Commentaries* *348-350.

When the colonies authorized the right to counsel, they intended to provide defendants with learned assistance in arguing legal points that could establish their innocence. Rhode Island, for example, guaranteed the "lawful privilege of any person that is indicted, to procure an attorn[ey] to plead any po[i]nt of law that may

make for the clearing of his innocency[,]" in express recognition that the defendant "may not be[] accomplished with so[] much wisdom[] and knowl[e]dge of the law as to plead his own[] innocency." 2 *Records of the Colony of Rhode Island* 239 (1857) (Act of Mar. 11, 1669). Other colonial statutes authorizing counsel similarly did not allow counsel to argue, let alone to admit, the fact of the defendant's guilt. McManus, *Law and Liberty in Early New England* 94 (2009).

As the practice of using counsel became more regular, counsel remained only an "assistant." *Faretta*, 422 U.S. at 820 & n.16. Even when assisted by counsel, defendants retained the right to make their own defense and the right to choose personally how to address the jury. *Id.* at 825. That allocation of responsibility reflected colonial "appreciation of the virtues of self-reliance and traditional distrust of lawyers." *Id.* at 826. "No State or Colony had ever forced counsel upon an accused; no spokesman had ever suggested that such a practice would be tolerable, much less advisable." *Id.* at 832. It can hardly be contended that the Framers would nonetheless have found it tolerable for counsel to force an unwanted admission of guilt upon the accused.

To the contrary, using involuntary confessions against the accused "was the chief iniquity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions" that formed the backdrop against which the Bill of Rights was written. *Brown* v. *Mississippi*, 297 U.S. 278, 287 (1936). It was "specially repugnant" to justice that the Star Chamber procured such confessions through counsel ostensibly provided for the accused's defense. *Faretta*, 422 U.S. at 822-823 (quoting 1 Stephen, *A History of the Criminal Law of England* 341-342 (1883)). The Star Chamber not only "forc[ed] counsel upon an unwilling defendant," *id.* at

821, but also made the defendant's counsel an instrument for the defendant's involuntary confession of guilt by providing that if counsel, "for whatever reason," did not endorse the defendant's denial of guilt, then "the defendant was considered to have confessed," *id.* at 821-822; *see id.* at 821-823 & n.18. The constitutional right against self-incrimination, adopted in response to that practice, would be hollow if the accused had no right to prevent his incrimination by his own counsel.

When the Bill of Rights was ratified and in the years afterward, it was understood that defense counsel could not admit the defendant's guilt over the defendant's objection. Thomas Erskine expressed the rule of the defense bar in 1792 during his celebrated defense of Thomas Paine:

> If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the judge ... and ... puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favor the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel.

1 Speeches of Lord Erskine 474-475 (High ed. 1876); *cf. Grosjean* v. *American Press Co.*, 297 U.S. 233, 247-248 (1936) (relying on Erskine). The same rule prevailed throughout the next century, with leading treatises expressing the widespread understanding that the defendant "has a right to have the evidence against him fully tested before it is relied upon for a conviction," that the assistance of counsel is intended "[t]o secure the benefit of this right," and that the denial of that right by the defendant's own counsel "would rend the

bonds of society." Warvelle, *Essays in Legal Ethics* 137 (1902).

The Sixth Amendment thus provides a defendant with both the right to control the objectives of his defense and the right to the assistance of counsel. It has never been understood to require a defendant to choose between the two. *Cf. Simmons* v. *United States*, 390 U.S. 377, 394 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another."). Put to that choice, a defendant would only "believe that the law contrives against him" and would feel the necessity to forgo counsel and represent himself—thus losing the benefits that skilled counsel brings and to which he is entitled. *Faretta*, 422 U.S. at 834 ("It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."). And the burdens of a rule requiring such a choice would fall most heavily on a defendant who lacks the means to seek out and hire an attorney who will abide by his wishes. The Sixth Amendment does not demand that choice, and it forbids a court from requiring a defendant to make it.

4. *Florida* v. *Nixon* does not alter this analysis. *Nixon* recognized that in a capital case a defendant might choose to admit guilt in order to bolster his chances of receiving a lesser sentence than death, and held that when counsel believes admitting guilt in the hope of a lesser sentence is an appropriate strategy, there is no "blanket rule demanding the defendant's explicit consent." *See* 543 U.S. 175, 181, 192 (2004). Accordingly, when—as in *Nixon*—a lawyer presents such a strategy to his client and the client neither agrees nor disagrees, but remains silent, his silence may be treated as implicit acquiescence; the defendant's express

consent is not required. *Id.* at 187-189; *cf. Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); *Brookhart* v. *Janis*, 384 U.S. 1, 6-7 (1966). In that event, the defendant is "deemed bound by the acts of his lawyer-agent." *New York* v. *Hill*, 528 U.S. 110, 115 (2000) (quotation marks omitted); *see Gonzalez*, 553 U.S. at 257 (Scalia, J., concurring in the judgment) (under common-law rule, defendant "who defends by counsel, and silently acquiesces in what they agree to, is bound as any other principal by the act of his agent") (quotation marks omitted).

The same is true of other rights that belong to the defendant personally under the Sixth Amendment. In *Faretta*, for example, the Court made clear that although the defendant has the right to insist on self-representation, counsel can be assigned for him if he acquiesces. The constitutional violation occurs "when [the defendant] insists that he wants to conduct his own defense" and is prevented from doing so. *Faretta*, 422 U.S. at 806, 821. Likewise, although the defendant has the right to testify, and counsel must fully inform him of that right, the defendant can implicitly acquiesce in waiving the right; he need not explicitly consent to waive the right to testify. 3 LaFave et al., *Criminal Procedure* §11.6(c), at 930 n.115 (4th ed. 2015); *e.g.*, *Siciliano* v. *Vose*, 834 F.2d 29, 30 (1st Cir. 1987) (Breyer, J.). Similarly, although the defendant, not his counsel, has "ultimate authority" to decide whether to take an appeal, *Roe* v. *Flores-Ortega*, 528 U.S. 470, 477 (2000), the defendant's explicit consent is not required to waive that right. If a defendant who is fully informed of his right to appeal does not request an appeal, he may waive his right to insist on it, *see Peguero* v. *United States*, 526 U.S. 23, 28 (1999), and no blanket rule requires his counsel to file a notice of appeal, *see Roe*, 528 U.S. at 477.

But nothing in *Nixon* or the cases discussed above remotely suggests that when a defendant clearly rejects his counsel's proposed strategy and insists that counsel defend against the charges rather than admitting guilt, counsel may overrule that decision. Even if a client might acquiesce in an admission of guilt by his lawyer acting as his agent, a client's express *refusal* to agree to an admission of guilt "ha[s] the effect of revoking [counsel's] agency with respect to the action in question." *Gonzalez*, 553 U.S. at 254 (Scalia, J., concurring in the judgment); *see Brookhart*, 384 U.S. at 6-7. A defendant has the right to insist that his counsel not admit his guilt. Defense counsel may not override the defendant's decision and thereby try "his case against his client." *Anders* v. *California*, 386 U.S. 738, 745 (1967). If he does so, he is no longer acting as the client's agent, and the defense is "stripped of the personal character upon which the [Sixth] Amendment insists." *Faretta*, 422 U.S. at 820.

B. The Louisiana Supreme Court Erred In Concluding That English's Admission Of McCoy's Guilt Was Required By—Or Consistent With—His Ethical Obligations

In upholding the trial court's conclusion that English, not McCoy, controlled the decision whether to admit guilt, the Louisiana Supreme Court posited a conflict between McCoy's Sixth Amendment right to defend against the charges at trial and his counsel's duties under applicable ethics rules. The court reasoned that McCoy's constitutional right had to give way to his lawyer's "ethical obligation to advance a lawful defense." JA84. The court was wrong. English had no ethical duty or authority to override McCoy's decision to put the prosecution to its burden of proof rather than

admit guilt. To the contrary, applicable ethics rules and standards of professional conduct *require* defense counsel to follow the client's direction as to whether to admit guilt or not, consistent with the Constitution's recognition that the decision to admit guilt is the defendant's—not the lawyer's—to make. And to the extent English believed he could not ethically advance particular arguments or call particular witnesses while contesting McCoy's guilt, there were steps he could have taken consistent with his ethical obligations. Admitting McCoy's guilt was not among them.

1. According to the Louisiana Supreme Court, English faced an ethical dilemma in view of Louisiana Rule of Professional Conduct 1.2(d), which provides that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." JA80.[3] Because, in the court's view, "the State's evidence against [McCoy] was overwhelming," and because McCoy's alibi defense "could not be substantiated, had no reasonable chance of success, [and] exposed those who attempted such a defense to the charge of perjury," the court believed that English could reasonably choose to admit McCoy's guilt. JA81, JA83.

But there was no ethical conflict here. The decision whether to defend against the charges or admit guilt in a criminal case does not implicate Rule 1.2(d). Denying guilt, in itself, can never be fraudulent, perjurious, or otherwise criminal. Rather, "the right to plead not guilty" and put the prosecution to its proof is among the "vouchsafed basic minimal rights" secured by the Due Process Clause. *Rideau* v. *Louisiana*, 373 U.S. 723, 726 (1963). "The right of an accused in a criminal

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[3] ABA Model Rule of Professional Conduct 1.2(d) is identical.

trial to due process is, in essence, the right of a fair opportunity to defend against the State's accusations." *Chambers* v. *Mississippi*, 410 U.S. 284, 294 (1973). And "[n]either the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt." *Carter* v. *Illinois*, 329 U.S. 173, 174 (1946).

Where a criminal defendant exercises his constitutional right to defend against the charges, the decision to deny guilt is not imputed to counsel and thus in no way implicates his ethical obligations to the court. *See* 3 LaFave, *Criminal Procedure* §11.6(c), at 935 ("A lawyer is not placed in a professionally embarrassing position when he is reluctantly required ... to go to trial in a weak case, since that decision is clearly attributed to his client."). To the contrary, a lawyer is ethically obligated to honor his client's direction not to admit guilt and put the government to its proof. The ABA Model Rules of Professional Conduct and the nearly identical Louisiana Rules provide that "a lawyer shall abide by a client's decisions concerning the objectives of the representation and ... shall consult with the client as to the means by which they are to be pursued." Rule 1.2(a). The most basic of those decisions is the decision whether to admit guilt or defend against the charges, and under the rules of ethics as well as the Constitution, it is the client's decision to make.[4]

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[4] Of course, counsel can and should consult with the client to advise him about the weight of the evidence, the likelihood of conviction, and the consequences of conviction. It is for that reason that this Court recognized in *Godinez* v. *Moran*, 509 U.S. 389 (1993), that a defendant who goes to trial must have the level of competence needed to make decisions after consultation with counsel about whether to put on a defense and, if so, what defense

If defense counsel has a fundamental disagreement with his client, the ABA Model Rules and Louisiana Rules provide a mechanism for handling that disagreement. Counsel may seek leave of the court to "withdraw from representing a client." Rule 1.16(b)(3). If the court denies leave to withdraw, however, "the attorney must implement his client's directions on a matter within the client's personal control, assuming that implementation does not require him to violate standards of professional responsibility." 3 LaFave, Criminal *Procedure* §11.6(a), at 897 n.7.[5] In sum, although a lawyer may determine *how* to pursue the client's objectives in a manner that does not violate standards of professional responsibility, those same standards give the lawyer no discretion as to *whether* to pursue the client's objectives. Here, simply refraining from announcing his client's guilt in no way violated English's ethical obligations.

2. The Louisiana Supreme Court also invoked this Court's decision in *Nix* v. *Whiteside*, 475 U.S. 157 (1986), to condone English's decision to admit McCoy's guilt. In *Nix*, faced with the threat of known perjury,

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to assert—decisions that the Court recognized are for the defendant to make. *Id.* at 398; *see also id.* at 405 (Kennedy, J., concurring in part and concurring in the judgment) (defendant at common law must have the level of competence needed "to instruct counsel, or to withdraw [counsel's] authority if he acts improperly" (quotation marks omitted)). But Rule 1.2(a) requires the criminal defense lawyer to abide by the client's decision once he has made it, barring the lawyer from admitting the defendant's guilt if he expressly insists on seeking acquittal.

[5] *See also Restatement (Third) of the Law Governing Lawyers* § 23 cmt. c ("[A] lawyer has no right to remain in a representation and insist, contrary to a client's instruction, that the client comply with the lawyer's view of the client's intended and lawful course of action[.]").

the defendant's lawyer had admonished him not to testify falsely and had threatened to withdraw if he did perjure himself. After the defendant testified according to counsel's direction, he was convicted and sought a new trial on the theory that he had been faced with "an impermissible choice between the right to counsel and the right to testify." *Id.* at 172. The Court rejected that argument, commenting that "at most [the defendant] was denied the right to have the assistance of counsel in the presentation of false testimony"—something he had no right to do in the first place. *See id.* at 174. Based on *Nix*, the Louisiana Supreme Court reasoned that English's decision to admit McCoy's guilt was permissible because doing otherwise would have meant facilitating perjury. JA81.

Nix is wholly inapplicable here. McCoy is not challenging English's refusal to present perjured testimony, nor would defending his client have required English to do so.[6] Rather, the question here is whether the trial court properly allowed English to tell the jury that his client was guilty, over McCoy's express objection. English did not merely counsel McCoy to testify truthfully; he affirmatively acted as a prosecutor and witness against his own client, assuring the jury of his

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[6] In *Nix*, the defendant affirmatively told his lawyer that he intended to commit perjury. 475 U.S. at 161. There was no such known perjury here. Rather, McCoy steadfastly maintained his alibi defense, and English was "certain that [McCoy] truly believed that he was out of state at the time of the crime." JA285-286. English simply disbelieved him in view of the strength of the prosecution's evidence. But "[t]he prohibition against offering false evidence only applies if the lawyer *knows* that the evidence is false. A lawyer's *reasonable belief* that evidence is false does not preclude its presentation to the trier of fact." ABA Model R. of Prof. Conduct 3.3 cmt. 8 (emphasis added); *accord* La. R. of Prof. Conduct 3.3.

guilt. No ethical rule required—or permitted—English to take that step. And his expressed motivation in doing so was not to avoid suborning perjury, but to try to build "credibility" with the jury and thus obtain a lesser sentence than death. JA287. Moreover, whereas the defendant in *Nix* was not deprived of his right to counsel or his right to testify, English's actions deprived McCoy of his constitutional right to decide whether to deny his guilt and put the government to its proof.

Indeed, *Nix* recognized that a lawyer may not admit his client's guilt even if the client has told the lawyer he committed the crime. *Nix* explained that although an "attorney's duty of confidentiality ... does not extend to a client's announced plans to engage in future criminal conduct," including perjury, the duty "totally covers the client's admission of guilt." 475 U.S. at 174. Here, of course, McCoy has consistently maintained his innocence and English has acknowledged McCoy's sincere belief in his innocence. JA284-290. Nothing in *Nix*—or anywhere else—suggests that although a lawyer may not admit his client's guilt when the client has confessed it to him, he may nonetheless do so when the client has vehemently protested any such admission and has always insisted on his innocence.[7]

Nix is thus consistent with the constitutional principle that the decision whether to admit guilt or to pursue acquittal is one the defendant has the right to make himself and which counsel may not overrule. As the Court explained, although "counsel is precluded from

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[7] English believed he had a supervening ethical duty to spare McCoy's life. *See supra*, pp. 7-9. But no rule of ethics or professional conduct gave him the power to pursue that goal by admitting guilt on behalf of a client who had been adjudged competent and who sought, as his primary goal, to contest his guilt.

taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law," "counsel must take all reasonable lawful means to attain the objectives of the client." 475 U.S. at 166. Attempting to obtain an acquittal by not admitting guilt and holding the prosecution to its burden of proof is a lawful objective, and defense counsel may not constitutionally or ethically sabotage that objective by trumpeting his client's guilt over the client's objection.

C. English's Admission Of McCoy's Guilt Over McCoy's Objection Requires A New Trial

When a lawyer admits his client's guilt and relieves the prosecution of its burden of proof over the client's express objection, the defendant suffers a structural error that is "so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to [its] effect on the outcome." *Neder* v. *United States*, 527 U.S. 1, 7 (1999) (quoting Fed. R. Crim. P. 52(a)). That is because the "constitutional deprivation" is not "simply an error in the trial process," but "affect[s] the framework within which the trial proceeds." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991) (quoting *Rose* v. *Clark*, 478 U.S. 570, 577-578 (1986)). Counsel's unauthorized admission deprives the defendant of his right to choose whether to admit guilt or defend against the charges, strips the trial of its adversary character, interposes adverse counsel between an unwilling defendant and his right to defend himself, and undermines the jury's findings by effectively relieving them of the obligation to find guilt beyond a reasonable doubt. The error is therefore structural and "require[s] reversal without regard to the evidence in the particular case." *Rose*, 478 U.S. at 577. Accordingly, McCoy is

entitled to a new trial without regard to whether the error was harmful.

Last Term, in *Weaver* v. *Massachusetts*, the Court identified "three broad rationales" supporting the conclusion that an error is structural and therefore not subject to harmless-error review. 137 S. Ct. 1899, 1908 (2017). The Court emphasized that "[t]hese categories are not rigid," and that "[i]n a particular case, more than one of these rationales may be part of the explanation for why an error is deemed to be structural." *Id.* Here, each of the Court's rationales obtains; standing alone or taken together, they demonstrate that counsel's unauthorized admission of guilt is a structural error.

First, an error is structural "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Weaver*, 137 S. Ct. at 1908. As discussed, the defendant's right to choose whether to admit guilt or put the prosecution to its burden is not designed solely to protect against erroneous conviction, but rather reflects "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." *Id.* (citing *Faretta*, 422 U.S. at 834).

In explicating this rationale in *Weaver*, the Court cited cases involving the right to self-representation (*McKaskle* and *Faretta*) and the right to counsel of one's choosing (*Gonzalez-Lopez*). 137 S. Ct. at 1908. Those rights, like the right at issue here, are independent of the right to a fair trial and instead reflect "particular guarantee[s] of fairness" rooted in distinct constitutionally protected concerns. *Gonzalez-Lopez*, 548 U.S. at 146. Like the decision to represent himself, the defendant's right to insist on his decision to contest his

guilt is integral to "speak[ing] for [him]self" through the defense he chooses to present. *McKaskle*, 465 U.S. at 177. It "exists to affirm the dignity and autonomy of the accused." *Id.* at 177-178. And like the right to choose his counsel, the right to choose whether to contest guilt guarantees that the defendant can personally choose the defense that "*he believes* to be best." *Gonzalez-Lopez*, 548 U.S. at 140 (emphasis added). As this Court has recognized, the denial of such rights is simply "not amenable to 'harmless error' analysis." *McKaskle*, 465 U.S. at 177 n.8.[8]

Second, "an error has been deemed structural if the effects of the error are simply too hard to measure." *Weaver*, 137 S. Ct. at 1908. Here, English's admission of guilt changed the entire character of the proceeding. Coming from the defendant's own counsel, such an admission carries particular weight: When a prosecutor "seeking a conviction" asserts that a defendant is guilty, "[j]urors understand this and may reasonably be expected to evaluate the government's evidence and arguments in light of its motivations." *Buck* v. *Davis*, 137 S. Ct. 759, 777 (2017). But when "a defendant's own lawyer" concedes the defendant's guilt, "it is in the nature of an admission against interest, more likely to be taken at face value." *Id.* That error necessarily infects the jury's deliberations and taints its findings. *See Kaley* v. *United States*, 134 S. Ct. 1090, 1102 (2014) (error is structural where it "pervades the entire trial"); *see id.* at 1107 (Roberts, C.J., dissenting) (similar). The error is structural because "the effect of the violation cannot be

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[8] Even the dissenters in *Faretta* recognized that a defendant who lost a constitutional right because of "such overbearing conduct by counsel" "against the wishes of the defendant" would have the remedy of a new trial. 422 U.S. at 848 (Blackmun, J., dissenting) (citing federal habeas cases granting new trials).

ascertained." *Vasquez* v. *Hillery*, 474 U.S. 254, 263 (1986). And as with choice of counsel, an attorney not committed to admitting guilt "will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument." *Gonzalez-Lopez*, 548 U.S. at 150. It is impossible to know "what different choices" counsel actually defending the charges would have made or "to quantify the impact of those different choices on the outcome of the proceedings." *Id.*

Third, and finally, "an error has been deemed structural if the error always results in fundamental unfairness." *Weaver*, 137 S. Ct. at 1908. Failure to give a reasonable-doubt instruction, for instance, renders a trial fundamentally unfair. *Sullivan* v. *Louisiana*, 508 U.S. 275, 279 (1993). What happened here is similar: It is hard to imagine a criminal proceeding more fundamentally unfair than one in which defense counsel admits his client's guilt, and relieves the prosecution of its burden of proof, over the express objection of a defendant who intends to maintain his innocence. The lawyer's decision to vouch for his client's guilt deprives the trial of its adversary character, predetermines the jury's verdict, and "undermine[s] the fairness of [the] criminal proceeding as a whole." *United States* v. *Davila*, 569 U.S. 597, 602 (2013).

Because the error here is structural, it is not subject to harmless-error review. *See Gonzalez-Lopez*, 548 U.S. at 152. But even if English's admission of McCoy's guilt were susceptible to harmless-error review, the State could not show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967); *see also Fulminante*, 499 U.S. at 306; Fed. R.

Crim. P. 52(a) (errors affecting "substantial rights" are not harmless).

To prove harmlessness, the State must prove that "the guilty verdict actually rendered in *this* trial was surely unattributable to the error," "no matter how inescapable the findings to support that verdict might be." *Sullivan*, 508 U.S. at 279. The State could never meet that burden here. English's repeated and adamant professions of McCoy's guilt in both his opening and his closing were profoundly incriminating. This Court has recognized that a defendant's "confession is probably the most probative and damaging evidence that can be admitted against him" and has a "profound impact on the jury." *Fulminante*, 499 U.S. at 296 (quotation marks omitted). Therefore, the Court requires "extreme caution before determining that the admission of [a] confession at trial was harmless." *Id.* An admission by counsel likely carries even more weight with the jury. A jury might be skeptical of the prosecution's presentation of a confession in a case where the defendant has pled not guilty, in view of the "conditions of stress, confusion, and anxiety" that often surround a confession. *Reck* v. *Pate*, 367 U.S. 433, 447 (1961) (Douglas, J., concurring). A confession from the defendant's lawyer, however, is a truly extraordinary thing. The jury would have been inclined to take English's admission of his client's guilt at face value, understanding that it reflected the considered judgment of defense counsel who is presumably experienced in defending the innocence of his clients, and who is privy to unadmitted evidence. *See Buck*, 137 S. Ct. at 777.

Indeed, English's admission went well beyond mere acknowledgment of guilt. *E.g.*, JA510 ("I've just told you he's guilty."). He told the jury that his admission relieved it (and the prosecution) of the bur-

den of finding McCoy guilty beyond a reasonable doubt, emphasizing that "no reasonable person could come to any other conclusion than Robert McCoy was the cause of these people's deaths." JA647; *see also id.* ("I took that burden off of [the prosecutor] Mr. Marvin. I took that burden off of you."). Just as "misdescription of the burden of proof" by the trial court "vitiates *all* the jury's findings," *Sullivan*, 508 U.S. at 281, defense counsel's relieving the prosecution of that burden cannot be harmless.

II. By Admitting McCoy's Guilt, Counsel Rendered Constitutionally Ineffective Assistance Requiring A New Trial

For the reasons discussed in Part I, the trial court's decision permitting English to admit guilt over McCoy's unambiguous objection violated McCoy's constitutional rights without regard to English's effectiveness as counsel and entitles McCoy to a new trial. Were the Court to reject that framework, however, and instead analyze counsel's admission of guilt as an issue of ineffective assistance of counsel, McCoy would still be entitled to a new trial. English's admission of McCoy's guilt to the jury over McCoy's objection—and his trial conduct in furtherance of that admission—constituted ineffective assistance under *United States* v. *Cronic*, 466 U.S. 648 (1984).[9]

"The right to the effective assistance of counsel is ... the right of the accused to require the prosecution's case

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[9] As the Louisiana Supreme Court acknowledged, McCoy has not raised a claim of ineffective assistance under *Strickland* in this direct appeal; consistent with Louisiana state practice, he has reserved that claim for development in post-conviction proceedings. *See* JA88 n.32; Resp. La. S. Ct. Br. 36.

to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656. "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate,'" *id.* (quoting *Anders*, 386 U.S. at 743), and "if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt," *id.* at 656 n.19. *Cronic* "recognized a narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense." *Nixon*, 543 U.S. at 190; *see also Roe*, 528 U.S. at 484. That exception applies in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified," *Cronic*, 466 U.S. at 658—*e.g.*, where "counsel has entirely failed to function as the client's advocate," *Nixon*, 543 U.S. at 189. In such cases, counsel's failure alone "demonstrate[s] a denial of the 'right to have the effective assistance of counsel,'" and the defendant "need not demonstrate prejudice in order to obtain relief." *Cuyler* v. *Sullivan*, 446 U.S. 335, 349 (1980).

English's admission of McCoy's guilt in the face of McCoy's express directive to the contrary was the paradigm of a breakdown in the adversarial process under *Cronic*. English entirely denied McCoy his constitutional right to defend against the charges and to hold the prosecution to its burden of proof. In doing so over McCoy's objection, English violated constitutional and professional norms governing the allocation of authority between lawyer and client. *Supra* Section I.A-B. Criminal defense counsel bears "the overarching duty to advocate the defendant's cause," *Strickland*, 466 U.S. at 688, and "must take all reasonable lawful means

to attain the objectives of the client," *Nix*, 475 U.S. at 166 (1986); *see also, e.g.*, ABA Model Rule 1.2(a) ("a lawyer shall abide by a client's decisions concerning the objectives of the representation"). But English's admission of guilt stripped McCoy of his prerogative to determine the ultimate objective of the defense. And by telling the jury he "took th[e] burden [of proof] off" both the prosecution and the jury, English literally "fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659.

English's admission also nullified other trial rights necessary to the "crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656. When a defendant pleads not guilty, he invokes a battery of "constitutional rights that inhere in a criminal trial." *Nixon*, 543 U.S. at 187. English's conduct of the trial eviscerated each one of those rights. A defendant has the due process right to hold the prosecution to its burden of proof. *Rideau*, 373 U.S. at 726. But English embellished his admission of McCoy's guilt by gratuitously telling the jury that that his admission relieved the prosecution of proving—and the jury of finding—that McCoy had committed the crime. JA510 ("I've just told you he's guilty"), JA647 ("I took that burden off of [the district attorney]. I took that burden off of you."). A defendant has the right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. amend. VI. But English failed entirely to pursue the case McCoy sought to put on, including by refusing McCoy's request to "subpoena people ... that will validate my innocence," including an alibi witness. JA393, JA398. And a defendant has a "right to confront [his] accusers" through cross-examination. *Nixon*, 543 U.S. at 187. But in cross-examining prosecution witnesses, English diminished McCoy's efforts to contest the

prosecution's case by announcing repeatedly before the jury that he was asking questions only at McCoy's behest. *E.g.*, JA517 ("I have a couple of questions—actually, Mr. McCoy wanted me to ask you a couple of questions."), JA515, JA524.

A defendant also has the right to choose whether to remain silent or to testify in his defense—a decision to be made "in the unfettered exercise of his own will." *Brooks*, 406 U.S. at 610. That choice was rendered self-destructive for McCoy. Because of English's conduct, McCoy had no way to present his defense but to testify himself, and to do so under the pall of an admission of guilt by his attorney. And when McCoy did testify, English used his own examination to impeach his own client's testimony in ways the prosecution did not do and could not have done. He introduced inculpatory facts and adversely mischaracterized the evidence through his own questioning of his client. For example, English confronted McCoy with the assertion that the prosecution had evidence of phone records showing that a phone number linked to McCoy made calls in Louisiana during the time McCoy claimed to be in Houston. JA579, JA598. The prosecution, however, had introduced no such evidence. And English confronted McCoy with the claim that the person shown in footage fleeing the crime scene was McCoy, even though no prosecution witness had identified him. JA513, JA588-589, JA592.

English thus conducted himself more as a prosecutor than as McCoy's advocate. The result was not merely a "breakdown in the adversarial process," *Cronic*, 466 U.S. at 662, but the evisceration of each of those "particular guarantee[s] of fairness" the Constitution deems essential to a fair trial, *Gonzalez-Lopez*, 548 U.S. at 146.

No claim of coherent defense strategy could justify English's admission—indeed, prosecution—of McCoy's guilt in the face of McCoy's objections. English asserted that he believed McCoy was "crazy" and unable to assist in his defense, and that the only way to save his life would be to admit guilt, argue for a lesser charge, and build a case for mercy at the penalty phase. *Supra* pp. 7-9. Yet English never asked the trial court to reconsider its finding that McCoy was competent to stand trial. And because McCoy had not submitted a plea of not guilty by reason of insanity, and "well-settled" Louisiana law precluded a diminished-capacity defense to murder independent of an insanity plea, English's argument for a lesser charge based on McCoy's lack of the mental capacity to form the requisite intent for murder was foreclosed. *Supra* p. 12. English's admission of McCoy's guilt thus left the jury with no choice but to convict McCoy of first-degree murder.

English's professed strategy of appealing to the jury for leniency through a mitigation defense was finally exposed as a house of cards at the penalty phase, when he called no witnesses except for a court-appointed psychologist who opined that English's theory of mitigation was *unfounded*. Dr. Vigen had previously told the court that McCoy was able to distinguish right from wrong and gave no indication that he would testify otherwise at the penalty phase. Yet English rested McCoy's fate on his testimony. And at English's prompting, Dr. Vigen confirmed to the jury that McCoy was in fact fully competent and suffered no mental illness that would have prevented him from knowing right from wrong. *Supra* p. 16-17. Far from supporting a case for mercy, Dr. Vigen portrayed McCoy under English's questioning as a hollow shell—a narcissistic dissembler with no "real self inside." *Supra* pp. 17.

As a result of English's conduct, McCoy's trial thus lost "its character as a confrontation between adversaries." *Cronic*, 466 U.S. at 656-657. And the circumstances were "so likely to prejudice [McCoy] that the cost of litigating their effect ... is unjustified." *Id.* at 658. Indeed, it is difficult to imagine a more prejudicial course for counsel to take. McCoy is entitled to a new trial.

CONCLUSION

The Louisiana Supreme Court's judgment should be reversed.

Respectfully submitted.

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No. 16-8255

In the Supreme Court of the United States

ROBERT LEROY MCCOY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

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CAPITAL CASE

QUESTION PRESENTED

Is it unconstitutional for a lawyer to use a concession strategy over his client's objection when the defense is most effective means of sparing the client's life and when the defense demanded by the client would violate the lawyer's legal and ethical obligations?

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INTRODUCTION

This Court has recognized that in the context of a criminal trial, autonomy has limits. It has never commanded an attorney to actively assist a defendant in putting on false testimony as a means to prove his innocence, nor has it required a trial court to protect the defendant's pursuit of such a defense. When a lawyer and his client have irreconcilable differences on strategy and a defendant wishes to be the *sole* "master" of his defense, the client has a choice—he may choose to represent himself. Robert McCoy could have had the defense he wanted had he timely asserted his right to self-represent. Because he did not do so, he ceded the larger strategic plan for the trial and what arguments to advance within it to his attorney, Larry English.

By acquiescing to representation, a defendant necessarily gives up some autonomy. If "[t]he core of the *Faretta* right" is that "the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury," then forgoing self-representation necessarily provides control to a defendant's lawyer. *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). "Once counsel is appointed... the attorney... *not the client*, has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring) (footnote omitted and emphasis added). Although the client must expressly consent to certain decisions, this Court held in *Florida v. Nixon*, 543 U.S. 175 (2004), that conceding guilt in the hope of avoiding the death penalty is not one of them.

English did not violate the Sixth Amendment when he conceded that McCoy killed the victims and focused instead on whether McCoy possessed the specific intent necessary for first degree murder. This strategic decision was within the scope of authority ceded to him; meanwhile, the alibi defense McCoy demanded was not a lawful directive. On direct review, the Louisiana Supreme Court found "the alibi defense the defendant wanted Mr. English to put on, but which could not be substantiated, had no reasonable chance of success, but exposed those who attempted such a defense to the charge of perjury." JA83; La. R. Prof. Cond. 1.2(d) and 3.3(b). The right to counsel did not command English to pursue this defense. English was further justified by his belief that McCoy's judgment was impaired and the concession defense was in his best interest. His loyalty to McCoy, demonstrated by the numerous motions and appeals he filed and the sincere efforts to save his life at trial, are commendable, not unconstitutional.

Strickland recognizes that "advocacy is an art and not a science," and that "strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based." 466 U.S. at 681. In assessing counsel's performance, *Strickland* takes into account a myriad of factors, including counsel's experience, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense. *Id.* McCoy wrongly seeks to pretermit that inquiry.

No one suggests that employing a concession strategy over the objections of a client is always reasonable or that it should be applied in anything other than rare circumstances. Whether this case is one of those rare cases, or whether English acted deficiently in concluding that it was, requires a careful assessment of the facts and record. That assessment must be made under *Strickland*.

STATEMENT

The Murders

Robert McCoy's then-wife, Yolanda Colston, went into protective custody April 16, 2008, following an incident of domestic abuse. According to Colston, McCoy hid inside her home, surprised her armed with a knife, pinned her down on the bed at knifepoint, and threatened to kill her and then kill himself. JA670-71. A warrant later issued for McCoy's arrest, but he evaded the police. R3372-73. Yolanda brought her infant daughter with her into protective custody in Dallas, but her son Gregory Lee Colston, who was set to graduate high school in May 2008, remained in Bossier City, Louisiana, so that he could finish the school year. JA32. Gregory stayed with his grandparents, Yolanda's parents, Christine Colston Young and Willie Ray Young. *Id.*

About a month later, on May 5, 2008, a 911 dispatcher received a frantic telephone call in which Christine Young is heard screaming "Robert, she ain't here Robert....I don't know where she is. The detectives have her – talk to the detectives. She ain't in there, Robert." A gunshot is audible before the line goes dead. R3293-95, JA33. Detectives, responding to this call,

arrived at the Youngs' home to find Christine and Willie dead from gunshot wounds to the head. Gregory had also been shot in the head, but was still alive. R3300-04, 3314-3321. He died a short time later at a hospital. R126, 936.

While in protective custody, Yolanda learned that her only son and her parents had all three been murdered—shot at close range in the head by her ex-husband. JA682.

The Evidence

Evidence implicating McCoy as the shooter was overwhelming. The 911 recording was only the beginning. After the 911 emergency dispatcher alerted police, Bossier City police officer Kary Szyska observed a white Kia, the same type of car owned by McCoy, fleeing the scene. R3281-82. Officer Szyska followed the Kia until it stopped and the driver jumped out of the vehicle, scaled a fence, and ran across interstate I-20. R3283-85. The fleeing driver matched McCoy's general description, and the vehicle was later identified as being registered to Robert and Yolanda McCoy. R3377. In the vehicle, police recovered a Walmart receipt dated May 5, 2008, for bullets for a .380 handgun and a cordless phone linked to the Colstons' house. R3286-88, 3377-78. A Walmart security video on May 5, 2008, showed McCoy, wearing a "do-rag," purchasing bullets. R3382-83.

Later, McCoy (wearing a do-rag) was apprehended in Idaho while destined for California riding in an 18-wheeler truck. In the truck, police found a loaded .380 caliber weapon behind the seat McCoy had occupied, which the driver denied owning. JA548-56, R3434. At

trial, a ballistics expert identified the gun as the murder weapon. The expert tied the cartridge casings found at the scene of the murder to the gun. R3398.

During the investigation, two of McCoy's personal friends—Sharon Moore and Gayle Houston—and his brother Spartacus McCoy gave statements to police placing McCoy in Bossier and implicating him in the crimes. Moore told police that McCoy stayed at her house the night before the murders, on the day of the murders asked her for money to buy bullets, and later phoned her and told her he shot someone in the head. JA544-46. Houston, who had known McCoy since childhood, told police he was with Spartacus when McCoy called and he rode in the car when Spartacus left, visibly upset, to pick up Robert McCoy in downtown Bossier City the night of the murders. R3410. While in the car, Houston heard Robert McCoy say he "f'ckd up" and had shot three people and that "he wasn't going back to jail." R3411-12. Spartacus, who died before trial, also had told police he picked up Robert, assisted in getting him out of Bossier City, and that Robert McCoy said he had shot three people. R936, R1451-52. Another of McCoy's brothers, Carlos McCoy, pleaded guilty to assisting McCoy in escaping Bossier City the night of the murders. R940.

McCoy's Alibi and Conspiracy Theory

Notwithstanding the statements of four individuals (including two of his brothers) placing him in Bossier, buying bullets, admitting to killing three people, and fleeing police, McCoy told his lawyers that he was in Houston on the night of the killings. JA227. McCoy could not provide any verifiable details regarding his Houston alibi witness, such as an address or a phone

number to reach her. JA227. This witness—the only person who could provide any actual corroboration he was in Houston—was never produced, even during the entire year post-trial while appeal counsel developed evidence in support of its motion for new trial. JA170. McCoy also made conflicting statements in pre-trial hearings, suggesting his lawyer corrupted his alibi witness, whom he identified as Sandra Black but as "Ms. [R]eena Miles" in his "Statement of Alibi." JA227, 450-51.

To explain the physical and eyewitness evidence against him, McCoy stated that he was the target in a vast police conspiracy to silence him after he supposedly revealed that certain Bossier Police were engaged in illegal drug trafficking. At trial, McCoy dismissed the testimony of the police as lies and the testimony of his friends as coerced. JA574-625. He stated that prior to the murders Bossier Parish police officers had come to his house, beat him, robbed him, stole his car, told him they were "going to do everything [the officer] could to get [him]," and then chased him out of Louisiana. JA583-89. He told the jury that the "Robert" referred to on the 911 tape was not him, but a corrupt, drug dealing, police officer, also named Robert, who killed the victims in a dispute over drug money. JA587-88. In another statement to the police, McCoy stated that Robert Thomas killed the victims in retaliation for Yolanda stealing drugs. R939. He further claimed that the Idaho police were complicit in the conspiracy, as were multiple medical personnel who lied about his multiple suicide attempts to cover up police beatings in Idaho and in Louisiana. JA604-620.

To advance his conspiracy theory, McCoy filed myriad *pro se* motions and requests to issue subpoenas to his "alibi" witnesses. Initially, he requested subpoenas for 12 individuals, including two of his brothers, a reporter, an FBI agent, a justice of the peace, and a sitting judge (Judge Shonda Stone). R55. He later requested a subpoena of "medical officials," R45, and for U.S. Senator David Vitter. R45, 511-12. On the stand, McCoy insisted that "I know Mr. David Vitter personally and Mr. David Vitter knows everything that goes on with me. . . . He sent the Department of Corrections that same medical brochure letting them know how bad these people beat me. He wasn't happy with it." JA621. Not surprisingly, Senator Vitter stated in a letter sent to the District Attorney that he did not know McCoy and did not receive any of the information McCoy claimed to have sent him. R514-15. Likewise, Judge Shonda Stone told McCoy's mitigation expert that McCoy's assertion that she could validate his story had no basis in fact. JA726-27. He had merely made an appointment to meet with her when she was still in private practice to discuss possible representation in his divorce proceeding, an appointment he missed. *Id.* Caddo Parish Deputy Virgil Roberson, another alibi witness who was also McCoy's cousin, contradicted McCoy's claims as well. JA697. Shreveport Police Officer Marcus Hines, another alleged alibi witness, likewise contradicted McCoy's assertions. JA726.

McCoy Clashes with his Public Defenders

The public defenders representing McCoy, Pamela Smart and Randall Fish, refused to adopt McCoy's *pro se* subpoena requests and advised him, without success,

not to file the *pro se* motions. Fish explained to the court that because of the limitations on parish-funded subpoenas, they did not want to use their subpoenas on witnesses who would serve no purpose. JA314. The refusal to issue the subpoenas led to repeated clashes between McCoy and his public defenders. Finally, because "they did not accept his claim of innocence and were not investigating and preparing the defense he wanted," JA288, he fired them and invoked his *Faretta* right. JA312. At the *Faretta* hearing—in February 2010, about a year and a half after his arraignment—Mr. Fish stated that he had attempted to work on McCoy's case with several attorneys, investigators, and a mitigation specialist but McCoy refused to cooperate. JA313.

The trial court conducted a *Faretta* colloquy, during which McCoy falsely advised the court he was educated and held a college degree from Rice University as well as a theology degree.[1] JA315-326. The trial court found McCoy competent to represent himself, albeit temporarily, based upon McCoy's representation that his family hired an attorney who would be taking over in a month. JA320, 323. The court reaffirmed that McCoy requested a speedy trial and cautioned that his counsel should be ready for trial May 24, 2010. JA306, 325.

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[1] *See* JA698-699. (Dr. Vigen testimony that McCoy's statements regarding his degrees were false).

English's Efforts, Clashes with McCoy, and Ethical Conundrum

McCoy decided to forego self-representation and hired Larry English in March 2010, three months before the scheduled trial. JA328. English advised the court he was not capital-certified; after a colloquy, McCoy waived his right to capital-certified counsel. JA330-31. English then requested a continuance, which the court initially denied but then granted in April after English sought appellate review. R147-48, R178. At that time, the trial court stated, "Mr. English, I want you to understand that if I grant this continuance, you will not be allowed to withdraw." English responded that he understood. JA335-36.

Efforts. English actively represented McCoy during the pre-trial period. He quickly filed motions to block the use of now-deceased Spartacus McCoy's statement and the use of Robert McCoy's prior bad acts. JA270, R359-361, 351. The former motion was granted; the latter denied despite an application for supervisory review filed by English. R358, R418, JA275. English took several steps to gain necessary funding, filing a "Motion for Funds" for mitigation experts in September 2010; and a motion to have McCoy declared indigent so he would be eligible for mitigation expert funds in December. R380. English used the funds to hire Dr. Mark Vigen, a clinical psychologist who specializes in capital cases, to evaluate McCoy's mental and emotional state. JA685-86, 688-89. Dr. Vigen and his staff spent well over 30 hours interviewing McCoy, his family, and the alibi witnesses and reviewing all documents in the case. JA690-91.

Closer to the trial, English filed a motion to limit use of autopsy and hospital photos of the deceased, which he contended would be highly prejudicial. JA472, 477. The State eventually agreed not to introduce the emergency room photos of Gregory. JA481. He attempted, without success, to meet with McCoy's parents to discuss a plea offer and the upcoming trial. JA455. And during voir dire, English successfully excused a juror for cause and exercised two *Batson* challenges, which he preserved for subsequent review on appeal. JA487-491. All the while, McCoy prepared for trial, including the likely penalty-phase proceedings.

Clashes with McCoy; Ethical Conundrum. By January 2011, it became apparent that McCoy and English did not agree on trial strategy. At a hearing on indigency, English told the judge he had questions about McCoy's competency and would not adopt his *pro se* subpoenas. JA347. English had come to believe that a mitigation strategy was in McCoy's best interest, even though McCoy did not wish to proceed with that approach. *Id.* English stated that he would not follow McCoy's advice unless ordered to by the court. *Id.* He explained:

> I believe that my client is suffering from some severe mental and emotional issues that has an impact upon this case. Mr. McCoy is [ ] recommending that I take a course of action that I do not believe is in his best interest. That I believe as a lawyer that I have an ethical duty given the ramifications of this case to not follow that advice that I am charged with at the end of the day. I have tried to explain to Mr. McCoy[,]

> whether he accepts it or not, I'm one of the few people that may be standing between him and a death sentence.

Id. The remainder of the hearing devolved into an argument between McCoy and English. JA347-352. The court repeatedly explained to McCoy that speaking out in court "may hamper Mr. English in being able to defend you in any way," to which McCoy replied that he understood and proceeded to speak on the record anyway. JA350-52. Nevertheless, at no point during this hearing did McCoy seek to remove English as his attorney. And despite their differences, English explained that he "reviewed every piece of... [the State's] evidence with Mr. McCoy." JA348, JA350.

Twenty days later, the two clashed again at a hearing on another continuance sought by English. McCoy, again against the advice of counsel and the court, aired his disagreements with a mitigation strategy and complained that English would not adopt his alibi subpoena requests. McCoy stated that "Mr. English has told me there is no way he can win this case" because of the overwhelming evidence of McCoy's guilt. JA390. The hearing turned into an argument between English and McCoy, during which English stated that McCoy "has severe mental issues," "continues to make statements that are irrational," and is "asking me to do and – to do things which I – I cannot do that goes [counter to] what his interests are in this trial." JA388. "Mr. McCoy has exhibited very bizarre behavior to me that warrants being put – warrants being further evaluated, Your Honor, and – and there are mitigating circumstances in this case." JA388. McCoy, however, did not attempt to have

English removed as his counsel. English ultimately pleaded to the court, "Mr. McCoy is asking me to subpoena witnesses to put forth a theory... that will help the District Attorney send him to the death chamber. I will not follow his advice. I will not subpoena FBI agents. I will not subpoena judges. I will not – I will not run all over the country looking for witnesses that don't exist." JA396.

Even so, McCoy stuck with English as his counsel. At the hearing, prosecutors advised McCoy that Louisiana Supreme Court Rules required an indigent capital defendant to have no fewer than two attorneys. JA361-62; *see also* La. Sup. Ct. R. XXXI(A)(1). English stated that he had consulted with other attorneys about the case, but was unable to obtain official co-counsel because of a lack of funding. JA365. "I have other lawyers who are advising me on this case, including the public offender's office... has been very helpful." JA379. The court discussed appointing a public defender to act as co-counsel but McCoy adamantly stated he did not want a public defender representing him. JA372. McCoy then explicitly waived the appointment of co-counsel and the court accepted his waiver. JA379-380.

When the court denied his motion for a continuance, English filed his third application for supervisory review in the case. The Louisiana Second Circuit Court of Appeal stayed the proceedings, R437, and issued a written opinion February 3, 2011, granting the continuance but directing the trial court to "ensure that Mr. McCoy is, or has been, fully apprised on the record of the benefits of having two capital-defense qualified

attorneys and that McCoy has knowingly and intelligently waived same." R438-440.

Later that day, the court held a second hearing on the State's motion to appoint additional counsel. JA404. While English stated that he would welcome assistance, McCoy adamantly opposed the public defender's appointment to his case, stating "I would love, you know, to have my prior representation of Mr. English." JA408-09. After being extensively questioned by both the court and the State and informed as to the right he was waiving, McCoy said "I choose not to be strong armed to take a public defender's aspect of my secondary counsel when that's totally against my wishes." JA419. He stated, specifically, that "I am confident with Mr. English." JA411.

Having waived his Fifth Amendment rights on numerous occasions, refused an insanity plea, refused a plea bargain, refused the advice of all his attorneys, waived additional capital-certified counsel, and actively filed over 100 pages of *pro se* documents and motions contrary to counsel's advice, McCoy—with English as his counsel—approached his capital murder trial now scheduled for July 28, 2011. JA379-380, 427, 436, 451, R18-502, 1328-29. Two weeks before trial, on July 12, 2011, the court held yet another hearing related to McCoy's *pro se* subpoenas. JA432. At that hearing, English told the judge that McCoy had no alibi and again affirmed that he did not adopt the subpoenas. JA433-434. He stated his "opinion that Mr. McCoy lacks the mental capacity to even help me defend himself in this case. I believe that Mr. McCoy is insane . . . ." JA436.

Explaining, English noted that he has "a client that believes that I'm in a conspiracy with you, the district attorney, the FBI, the Bossier Parish Sheriff's Department, the Caddo Parish Sheriff's Department, and the United States. . . to convict him." *Id.* English insisted that he would "not adopt those [m]otions," which would "further move him more quickly to the death penalty." *Id.* English emphasized his "ethical duty . . . to try to defend him and do the most best I can to save his life"; "I have no ethical duty as a lawyer to hold Mr. McCoy's hand while he walks into the death chamber." JA441. Although McCoy disagreed with English's views, at no point during this hearing did McCoy move to remove English as his counsel.

McCoy did not attempt to fire English until the weekend before trial. The matter came to the court's attention for the first time July 26, 2011, two days before trial. JA449. Immediately before attempting to fire English, McCoy acknowledged that he had previously stated on the record several times that he wanted English to represent him, despite their differences and the fact that English was not capital certified. R1619. McCoy then told the court he had obtained substitute counsel–but that counsel had not filed a motion to appear and did not appear in court in person. JA456. Indeed, McCoy could not even provide the court with the names of his alleged substitute counsel. JA457. English did not object to being removed as counsel. JA458. Earlier that month, English had explained very simply: "I'm the best Mr. McCoy has." R1629. Because of the close proximity to trial, and McCoy's history of seeking to change counsel and upset trial dates, the court interpreted this last-minute request as an attempt to obstruct its orderly procedure

and administration of justice and denied McCoy's request to substitute counsel as untimely. JA460-61. The court denied McCoy's subsequent request to represent himself for the same reasons. JA465.

The Trial

English began the trial with several disadvantages. McCoy's prior refusal to plead not guilty by reason of insanity limited English's ability to submit evidence regarding a mental defect. JA210-226, R1328-29. McCoy's frequent waivers of his Fifth Amendment rights exposed him to significant attacks on his credibility and would allow the prosecution to highlight his propensity for domestic violence. McCoy insisted on taking the stand and testifying that he is the victim of a vast, multi-state conspiracy. Finally, and most significantly, the prosecution was able to present a compelling picture of McCoy as a cold-blooded killer who executed his wife's parents and his own stepson for hiding his wife. JA497-503, 639-646.

Through opening arguments, English tried to suggest a less brutal context for the evidence he knew was coming and which portrayed a more sympathetic view of McCoy than that presented by the prosecution. JA504-512. English's goal was to establish credibility with the jury and encourage sympathy for McCoy as a damaged individual for whom the death penalty was not warranted. And so he began by acknowledging that "Robert McCoy was the cause of these individuals' deaths," but explained "that's not the only issue to be decided." JA504. That is because "[t]his is a first degree murder trial," which means "the District Attorney has to prove specific intent." JA508. But, he argued, "the evidence will show that because of Mr. McCoy's

emotional and mental condition" he lacked specific intent. English noted that McCoy tried to commit suicide several times because he is "so racked with guilt about this case." He then turned McCoy's expected testimony to his advantage, as evidence of his "serious emotional issues that inhibit[] his ability to function in society and to make rational decisions." JA509.

In short, English argued, the State could *not* prove McCoy had the specific intent to kill because he "is crazy" and "lives in a fantasy world." JA509, 510. This theme continued throughout English's opening statement. He implored the jury to remember McCoy's rights and not to allow statements by the prosecution to inflame them and affect the verdict. JA510-11. "[T]he issue is whether or not in this phase of the trial that Robert McCoy is guilty of first degree murder. And I say to you that he is not. I say to you that Mr. McCoy is a damaged human being that cannot function among us and his mental and emotional state is a mitigating factor in this case." JA511.[2]

Following opening statements, the State presented its case. As McCoy acknowledged in his brief, English cross-examined all of the State's witnesses. JA513-527, JA536-542, JA552-58. Among other things, English used his cross-examination questioning to ask about McCoy's numerous suicide attempts in attempt to show

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[2] As McCoy notes (at 11 of his brief), in the middle of the opening statement English once accidentally identified himself as a "district attorney." JA509. That is no more meaningful than the fact that during his closing statement he accidentally stated that "Mr. McCoy (sic) can play the 911 tape," when he meant Mr. Schuyler Marvin, the district attorney.

that McCoy felt remorse. JA510-522. He also established that McCoy had no history of violence or threatening the victims. JA523. English then conducted a direct examination of McCoy, during which McCoy attempted to explain away the evidence against him by positing his elaborate conspiracy theory. JA568-625. McCoy told the jury that after he exposed the police officers for drug-dealing, "Detective Humphrey told me he was going to kill me" and then Officer "McGhee and them took [my car] from me." JA583, 589. After his car was stolen, McCoy claimed he left Louisiana and was in Houston the night of the murders with Sandra Black, contrary to his "Statement of Alibi" in which he identified the person he stayed with as "[R]eena Miles". JA597-98, JA227, R70.

To explain how the murder weapon came to be in the truck when McCoy was apprehended in Idaho, McCoy testified that he personally saw an officer from the Idaho Police Department, a Mr. Craig Roberts (who had testified earlier), "put [the gun] in the doggone truck." JA605-06. McCoy also vehemently denied that he had attempted to commit suicide in prison, instead stating that the records of his suicide were fabricated to cover up the fact that prison officials in Bossier "beat me consistently," "something ruptured in my stomach from the constant beatings," and "shot me with a Taser with the prongs on it and jerked them out. This is where he ripped my main artery in my arm." JA612, 617.

English, in his closing, returned to the themes he had developed in his opening statement. He acknowledged that "our heart cries out to" the three victims and that we "weep" for Gregory Colston, Willie

Young, and Christine Colston. But, he explained, "the law requires you to put aside emotions, passions and prejudice and apply the evidence." JA648. And that evidence shows that, although "Robert McCoy was the cause of these people's deaths," "this case was about whether or not Robert McCoy has the specific intent to commit first degree murder." McCoy did not, English argued, because he "is so defective emotionally. He is so defective mentally." *Id.* Again turning McCoy's unbelievable testimony to his advantage, English stated that "if you find that Robert McCoy on that stand was paranoid, delusional, wrapped up in his own world, then I think you have to find that first degree murder is not appropriate; that second degree murder is appropriate and that Robert McCoy spend the rest of his natural life in jail." JA650. English then pointed to McCoy's suicide attempts as further proof:

> People who try to kill themselves five times, people who chew their arms off, people who stuff toilet tissue down their . . . throats, people who hang themselves, people who believe that the police who protect us, the FBI, the Bossier Parish Police Department, are all in a collusion to kill them, to get them, they're not with us.

English closed by reminding the jury to "divorce [it]self from the emotions and the passions and remember the individual that you saw on this stand. . . And that you reach a conclusion he did not have the specific intent to kill these people; that he is guilty of second degree murder . . . ." JA651.

The jury retired, but did not quickly return a verdict of first degree murder. It submitted several questions to the court, asking to review the videos and to listen

again to the 911 tape, to see a map with the layout of the house, and to be reminded of the definitions of "murder one, murder two"—a sign that English's strategy had gained some traction. JA654-59. R3553. After additional deliberations, the jury returned a verdict of three counts of first degree murder. R3573.

The Penalty Phase

The jury returned for the penalty phase several days later. The prosecution began with Yolanda Colston describing McCoy's assault on her prior to the murders, while their two-year-old daughter clung to her leg. JA670. Ms. Colston testified about her loss. JA682-683. English objected to the details of the aggravated assault being discussed, but his objection was overruled. JA671-67. Gregory's basketball coach and best friend both testified, stating that Gregory was a good student, a mentor to others, and a good friend, who was planning to go to college and play basketball. R3613-3622.

English presented one mitigation witness—Dr. Vigen. He testified to the clinical diagnoses behind English's layman description of McCoy as "crazy." JA705. Vigen detailed his findings that McCoy has several personality disorders which affect the way he views reality and his personal relationships, rendering him "very ineffective in working with other people." JA706-07. Dr. Vigen further told the jury that McCoy's personality disorders played a role in the murders and "certainly influenced his behavior in that house." JA736. He also discussed McCoy's suicide attempts and explained to the jury that this could have been an expression of his grief over committing the murders. JA708-09, 728-731. Dr. Vigen explained that McCoy

needed to re-formulate the facts to fit his viewpoint and did not have the psychological wherewithal to comprehend any view of reality other than his own. JA696-704, 730.

In his penalty-phase closing, English, consistent with his overall strategy from the beginning, begged for mercy. He urged the jury to remember that he had been honest from the beginning. JA751. He expressed sympathy for Yolanda McCoy and her family and compassion for a lost teenager's life. JA751. But, he argued, the State failed to meet its burden of proof on aggravating factors. JA752-54. He argued that McCoy suffered from an extreme emotional personality disorder, and said "I told you that Robert McCoy was crazy because I tried to communicate to you in words we could all understand. But Robert McCoy has some serious mental and emotional issues that impacted on him when he was in that house." JA754-55. In his final statements, he asked the jury "to do a very difficult thing, to try to step outside the emotions, to try to step outside the need to call for vengeance in all of us and to see Robert McCoy's humanity and to send Robert McCoy to jail for the rest of his natural life." JA757.

The jury retired and again asked questions, one of which was "may we have doctor's diagnosis?" R3732. After the jury submitted additional questions, English moved for the court to ask the jury whether further deliberations would "do any good in this case. They have been out for four hours now." R3737. When the State objected, the court acknowledged, "one of the questions that they did ask is what is the time limit before we are considered a deadlocked jury." *Id.* The court also advised that the second question was "Can

we hear the definition of an expert witness and how much weight is given?" R3739. After the court re-read its earlier charges, the jury continued to deliberate and eventually returned a unanimous verdict recommending the death penalty for all three murders. R3756.

Post-Trial Proceedings

In a motion for new trial filed by new counsel, English testified and submitted an affidavit regarding the breakdown of his relationship with his client. JA284-290. He stated that he believed the evidence against McCoy was overwhelming and he had an ethical obligation to try and save McCoy's life. JA286. He further stated that McCoy came to view him as part of the conspiracy to convict him. *Id.*

McCoy's new counsel sought to investigate McCoy's alibi claim and ultimately moved for a new trial. R830-38, 842. Requesting additional time to investigate McCoy's claims, counsel stated that "Given his current review of the materials, interviews with Mr. McCoy and discussion with Mr. McCoy's former counsel and mental health professionals undersigned counsel can only say that McCoy is either innocent of the charges of which he has been convicted or as crazy as Mr. English has said." R834. Counsel also moved to appoint a second sanity commission, arguing that "this court unquestionably has reasonable ground to doubt the defendant's mental capacity to proceed." R840. Counsel further stated that English provided significant evidence to the court of the defendant's "mental illness, and that according to medical and jail accounts, he engaged in serious suicide attempts at least four times during the pendency of the case." R883. The court

denied the motions for a new trial and a new sanity hearing. R1-C, 3798-3800, 3897-3901.

The Louisiana Supreme Court Opinion

On direct appeal to the Louisiana Supreme Court, McCoy raised 16 assignments of error, several of which asserted interrelated arguments regarding the concession defense English used over McCoy's objection. The Louisiana Supreme Court began by noting "that the evidence of the defendant's guilt was overwhelming. Nonetheless, the defendant persists in pursuing his alibi theory, and appellate counsel has expended considerable resources to investigate that defense, which appears wholly baseless." JA170.

The Louisiana Supreme Court, after reviewing the entirety of the record, found the trial court did not abuse its discretion in refusing to allow English to withdraw, nor did it err by refusing McCoy's cursory and untimely request to self-represent. While recognizing that the Sixth Amendment grants defendants both the right to counsel of their choice and the right to self-representation, the Louisiana Supreme Court also recognized that neither right is absolute. JA53, 68. "This court has consistently held that this right cannot be manipulated to obstruct the orderly procedure of the courts and cannot be used to interfere with the fair administration of justice." JA58, 69. "Defendant must exercise his right to counsel of his choice [and to self-representation] at a reasonable time, in a reasonable manner and at an appropriate stage of the proceedings." JA56, 69. The Louisiana Supreme Court acknowledged McCoy's claim that he did not know of English's specific method of carrying out his strategy until July 12, 2011, but found McCoy knew

English's trial strategy, to avoid the death penalty by conceding guilt and seeking a life sentence, some eight months prior. JA67.

The court next held that McCoy's ineffective-assistance-of-counsel claim, based on English's concession defense, should be assessed under *Strickland v. Washington*, 466 U.S. 668 (1984), rather than *United States v. Cronic*, 466 U.S. 648 (1984). JA96. McCoy had argued that the concession of guilt "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing" and therefore falls into one of *Cronic*'s enumerated categories where prejudice must be presumed. JA90. But the Louisiana Supreme Court pointed out that to fall within this category, "the attorney's failure must be complete." *Id.* Yet "English remained active at trial, probing weaknesses in the prosecution's case. . . . [D]uring jury selection, Mr. English ardently fought to retain some racial diversity in the defendant's trial by pressing a *Batson* claim and arguing for challenges when warranted. During trial, Mr. English cross-examined most of the State's guilt phase witnesses, frequently asking questions written by the defendant." JA91.

The Louisiana Supreme Court further noted that "the Sixth Amendment does not require that counsel do what is impossible or unethical." JA80 (citing *Cronic*, 466 U.S. at 656 n.19). Because McCoy's alibi defense "could not be substantiated, had no reasonable chance of success, [and] exposed those who attempted such a defense to the charge of perjury," pursuing it would have violated Louisiana Rule of Professional Conduct 1.2(d) and 3.3(b). JA81-83. The court declined to find that English "completely abdicate[d] the defendant's

defense, rather Mr. English advanced what he saw was the only viable course of action." JA90.

The Louisiana Supreme Court found its conclusion supported by *Florida v. Nixon*, 543 U.S. 175 (2004), which held that the proper rubric to evaluate a concession strategy is the two-pronged *Strickland* test. JA93-94. The Louisiana court noted *Nixon*'s recognition that "a concession strategy does not amount to the functional equivalent of entering a guilty plea on the defendant's behalf," and that it "may constitute a reasonable strategic choice in a case where the circumstances of the crime are horrendous and the evidence of the defendant's guilt overwhelming." JA94 (citing *Nixon*, 543 at 191). Here, the court found:

> Given the circumstances of this crime and the overwhelming evidence incriminating the defendant, admitting guilt in an attempt to avoid the imposition of the death penalty appears to constitute reasonable trial strategy. The jury was left with several choices after Mr. English conceded that the defendant shot the three victims, including returning a responsive verdict of second degree murder or manslaughter, as well as not returning the death penalty.

JA95.

SUMMARY OF ARGUMENT

Robert McCoy is bound by his counsel's decision to concede he committed the charged murders. Autonomy in the context of a criminal trial has limits. And when a defendant acquiesces to being represented by counsel, he necessarily gives up some autonomy. More specifically, a defendant gives up some of his autonomy to control strategic and tactical decisions, including the larger strategic plan for trial and arguments to advance. A defendant who wishes to be the sole "master" of his case so that he can exercise absolute control has the choice to represent himself but he must do so in a timely manner. Though McCoy disagreed with English's defense strategy as early as January 2011, he did not ask the court for permission to replace McCoy until two days before trial. The trial court acted within its discretion to deny his request.

The specific strategy of conceding elements of the crime and focusing on the weakest elements is a recognized defense strategy and is not among the trial decisions for which a client's express consent is required. In *Florida v. Nixon*, this Court rejected the claims that this strategy was the functional equivalent of a guilty plea and that express consent was required for counsel to use it. 543 U.S. 175, 187-88. In the context of a death case, the Court recognized that this defense may be the best and perhaps only viable strategy to save the defendant's life when the state has overwhelming evidence the defendant committed the charged murders. *Id.* at 190-91. Where only a concession strategy has a realistic chance of sparing the defendant's life, pursuing that course, even over the defendant's objection, is the only course "consistent

with the lawyer's conscience, the law, and his duties to the court." *Jones v. Barnes*, 463 U.S. 745, 759 (1983) (Brennan, J., dissenting). The Sixth Amendment does not bar counsel from pursuing it.

In most cases, conceding guilt is an unwise strategy, the defendant will agree to pursue that strategy, or—if counsel and the defendant irreconcilably disagree about the strategy—new counsel will be obtained. Where, however, counsel could not withdraw, the defendant's objective is to personally advance a patently false conspiracy theory, and the best hope of avoiding the death penalty is to concede guilt, counsel's professional and ethical obligations permit him to do so. English knew McCoy intended to present false testimony based on his review of the evidence, his review of interviews with the alibi witnesses, and the sheer absurdity of McCoy's story. After English rejected McCoy's conspiracy theory as utterly incredible and contrary to several of his alibi witnesses' statements, he properly, indeed commendably, refused to "advocate or passively tolerate [his] client's giving false testimony." *Nix v. Whiteside*, 475 U.S. 157, 171 (1986). Counsel's duty of loyalty and zeal is "limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth," including not "taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Id.* at 166.

McCoy did not want English to simply hold the State to its burden, but wanted him to advance a *specific* alibi defense. *See* JA398-99; *see also* JA661-662. Had McCoy not demanded a specific defense that English believed to be unethical and illegal, but only requested that his innocence be maintained, the case

before this Court might be very different. Here, the concession defense was the best available lawful defense given the evidence. Respecting defendant autonomy does not and never has required an attorney to abandon his professional judgment and conscience, especially in a case such as this when the attorney believes he is acting in his client's best interest and believes his client's judgment is impaired.

English's decision to concede guilt should be assessed under the *Strickland v. Washington* test for ineffective assistance of counsel. McCoy reserved his *Strickland* claims for collateral review, and no state court has yet ruled on it. Here, he argues that the limited exception to *Strickland* recognized in *United States v. Cronic*, under which prejudice is presumed, applies. He is wrong. In *Florida v. Nixon*, this Court held that counsel's concession of guilt in a capital case is not subject to the *Cronic* presumption. That remains the law, McCoy's express objection to the strategy does not change the result, and none of the other facts of this case requires a different conclusion.

ARGUMENT

I. McCoy Is Bound by His Counsel's Decision to Concede He Committed the *Actus Reus* of the Charged Crimes.

This Court has recognized that in the context of a criminal trial, autonomy has limits. It has never commanded an attorney to actively assist a defendant in putting on false testimony as a means to prove his innocence, nor has it required a trial court to protect the defendant's pursuit of such a defense.

A. A defendant gives up his autonomy to control strategic and tactical trial decisions by retaining, or acceding to the appointment of, counsel.

A defendant who wishes to exercise absolute control over the presentation of his defense has the choice to represent himself. *Faretta v. California*, 422 U.S. 806, 820 (1975). "The pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984). Thus, if a defendant does not want to "allocate to the counsel the power to make binding decisions of trial strategy," he may decline "to accept counsel as his representative." *Faretta*, 422 U.S. at 820. Once he retains or accepts counsel, he cedes significant control over his defense.

Although counsel must "consult with the client regarding 'important decisions,'" he need not "obtain the defendant's consent to 'every tactical decision.'"

Nixon, 543 U.S. at 187 (quoting *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)). That rule "is a practical necessity" because "[t]he adversary process could not function effectively if every tactical decision required client approval." *Gonzalez v. United States*, 553 U.S. 242, 249 (2008) (internal quotation marks omitted). Accordingly, although the principles of agency generally guide the attorney-client relationship, *see Coleman v. Thompson*, 501 U.S. 722, 753-754 (1991), "with the exception of [certain] fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case." *Jones v. Barnes*, 463 U.S. 745, 753 n.6 (1983).

Applying that principle, this Court has held that "the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial." *Taylor*, 484 U.S. at 418. More generally, trial counsel determines both the "larger strategic plan for the trial" and what "arguments to advance" within it. *Gonzalez*, 553 U.S. at 249. *See also Brookhart v. Janis*, 384 U.S. 1, 8 (1966) (Harlan, J., dissenting) ("a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval").

When McCoy retained English as counsel he acquiesced in English's control over the defense strategy and tactics. Even though McCoy disagreed with English's defense strategy as early as January 2011, he did not ask the trial court for permission to replace McCoy or to represent himself until mere days before the trial was set to begin. As the Louisiana

Supreme Court held, JA74, the trial court acted well within its discretion in denying that request as untimely. *See Martinez v. Court of Appeal*, 528 U.S. 152, 161-162 (2000) (noting that "most courts" require defendants to assert their *Faretta* right "in a timely manner") (footnote omitted). McCoy did not seek this Court's review of that ruling.

B. The strategy of conceding elements of the crime and focusing on the weakest elements is not among the trial decisions for which a client's express consent is required.

This Court has held that a few important rights—"to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"—may be waived only with the client's consent. *Jones*, 463 U.S. at 751. But "[w]ith the exception of these specified fundamental decisions, an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client." *Jones*, 463 U.S. at 753 n.6. In *Florida v. Nixon*, 543 U.S. 175 (2004), the Court declined to add contesting guilt at the guilt phase of a capital trial to that list.

Nixon concluded that strategically conceding guilt in a capital case is not "the equivalent of a guilty plea" and may be defense counsel's wisest course. *Id.* at 189-191. As the Court explained, a "guilty plea is 'more than a confession which admits that the accused did various acts,' it is a 'stipulation that no proof by the prosecution need be advanced.'" *Id.* at 188 (quoting *Boykin v. Alabama*, 395 U.S. 238, 242 (1969)). A "plea is not simply a strategic choice; it is itself a

conviction." *Id.* at 187 (citation and internal quotation marks omitted).

By contrast, a capital defendant whose counsel concedes guilt "retain[s] the rights accorded a defendant in a criminal trial." *Id.* at 188. The defendant still has the right to a trial by jury, the protection against self-incrimination, and the right of confrontation. *Id.* at 188-189. In addition, the defense could attempt to "exclude prejudicial evidence," and preserve the ability to appeal "errors in trial or jury instructions." *Id.* And critically, because the State must present its evidence establishing the elements of the crime during the guilt phase, "[t]hat aggressive evidence would [ ] be separated from the penalty phase, enabling the defense to concentrate that portion of the trial on mitigating factors." *Id.*

For those reasons, a concession strategy is not inconsistent with the plea of not guilty. "Winning over an audience by empathy is a technique that dates back to Aristotle." *Yarborough v. Gentry*, 540 U.S. 1, 11 (2003) (internal citation and quotation marks omitted). Where the prosecution has not agreed to recommend a life sentence in return, "pleading guilty . . . holds little if any benefit for the defendant." *Nixon*, 543 U.S. at 191 n.6 (citing *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* §10.9.2 cmt., reprinted in 31 HOFSTRA L. REV. 913, 1045 (2003)). As the United States explained in its *amicus* brief, "If the trial is infected by error and the defendant obtains a mistrial or a reversal, the prosecution may be more willing at that point to bargain for a guilty plea rather than retry the case." U.S. Br. at 22, *Florida v. Nixon*, 543 U.S. 175.

If the concession in *Nixon* was not considered the functional equivalent of a guilty plea, the concession in this case cannot either. Unlike here, Nixon's counsel's concession in the closing argument was total; he agreed that Florida had proven all of the elements of the charged crime: "I think that what you will decide is that the State of Florida . . . has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson." *Nixon v. State*, 857 So.2d 172, 174 (Fla. 2003), *rev'd*, *Nixon*, 543 U.S. at 193 (citation omitted).

Having concluded that conceding guilt is not the equivalent of pleading guilty, this Court held that counsel was not "required to gain express consent before conceding Nixon's guilt." *Id.* at 189. The decision whether to concede guilt at trial for tactical reasons is therefore not one of the "basic trial choices [ ] so important that an attorney must seek the client's consent" before making it. *Gonzalez*, 553 U.S. at 250.

C. English's decision to concede that McCoy killed the victims, over his objection, did not violate McCoy's Sixth Amendment rights.

McCoy nonetheless insists that the decision whether to concede he killed the victims must be distinguished from other "strategic plan[s] for the trial" and "arguments to advance" that counsel may make in his own discretion. He asks this Court to create a new category of trial-related decisions, to which conceding guilt would be the first addition—decisions for which the client's consent is not needed, but which may not be

made over his express objection. *See* Pet'r Br. 21-38. This Court should decline the invitation.

McCoy's argument echoes Justice Brennan's dissent in *Jones v. Barnes*, where he stated that the "right to counsel as *Faretta* . . . conceive[s] it is not an all-or-nothing right, under which a defendant must choose between forgoing the assistance of counsel altogether or relinquishing control over every aspect of his case beyond its most basic structure." 463 U.S. at 759; *see* Pet'r Br. 24. Justice Brennan added a critical caveat, however, which McCoy brushes aside. Counsel should let the defendant decide which arguments to press, he said, "insofar as that is possible consistent with the lawyer's conscience, the law, and his duties to the court." *Id.*

That caveat controls this case. Where only a concession strategy has a realistic chance of sparing the defendant's life, pursuing that course, even over the defendant's objection, is the only course "consistent with the lawyer's conscience, the law, and his duties to the court." The Sixth Amendment does not bar counsel from pursuing it.

1. In most cases, counsel may not concede guilt over the defendant's objection.

The Sixth Amendment's requirement that counsel provide effective assistance, as well as rules of professional conduct, will preclude a concession strategy over the defendant's objection in the vast majority of cases. No one contends that conceding guilt is a wise or proper course "in a run-of-the-mine trial." *Nixon*, 542 U.S. at 190. No one disputes, therefore, that in an ordinary case counsel would be acting

ineffectively by conceding guilt over the defendant's objection.

Ethical rules further narrow the circumstances where counsel may concede guilt over his client's objection. Both Model Rule 1.2(a) and Louisiana Rule of Professional Conduct 1.2(a) state in part that "a lawyer shall abide by a client's decisions concerning the objectives of representation." Comment 1 to the Model Rule clarified, however, that the rule "confers upon the client the ultimate authority to determine the purposes to be served by legal representation, *within the limits imposed by law and the lawyer's professional obligations*." (Emphasis added.)[3] The situations when a lawyer cannot abide by a client's objective because of "the limits imposed by law and the lawyer's professional obligations" will necessarily be rare.

And when defense counsel and his client have a fundamental and irreconcilable disagreement about critical strategic issues and decisions, the usual remedy is for counsel to withdraw or the client to fire her. *See* RESTATEMENT 3D OF THE LAW GOVERNING LAWYERS § 32. That leaves the unusual situation presented by this case: where "the limits imposed by law and the lawyer's professional obligations" demand that counsel concede guilt, the defendant objects to that strategy, and counsel is not permitted to withdraw.

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[3] Although Louisiana has not adopted the comments to the ABA's model rules, where the rule is the same, it may rely on them as persuasive authority. *See, e.g., In re Greenburg*, 9 So.3d 802, 806 (La. 2009).

2. In the rare case—such as this one—where only a concession strategy might spare the defendant's life, the Sixth Amendment does not categorically bar its use over the defendant's objection.

Where "the defendant's guilt is clear," counsel "may reasonably decide to focus on . . . persuad[ing] the trier that his client's life should be spared." *Nixon*, 542 U.S. at 191. In this narrow band of cases, counsel's duty to represent his client to the utmost of his ability and to zealously seek the best outcome may clash with counsel's duty to seek the client's stated objectives. McCoy maintains that the Sixth Amendment dictates the answer to that dilemma and that a defendant's "autonomy" overrides counsel's considered strategic judgment. It does not.

Lawyers' professional and ethical obligations inform the operation of the Sixth Amendment. Although the "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel," counsel's professional and ethical duties invariably shape what conduct is "acceptable under the Sixth Amendment." *Nix v. Whiteside*, 475 U.S. 157, 165, 166 (1986). Just as the "presumption in favor of counsel of choice" gives way to courts' "independent interest in ensuring that criminal trials are conducted within the ethical standard of the profession," *Wheat v. United States*, 486 U.S. 153, 160 (1988), so too must clients' interest in deciding important strategic matters.

Applicable ethical standards barred English from pursuing McCoy's "objective" of asserting a defense

based on false testimony and commanded that he zealously attempt to keep McCoy off death row. The Sixth Amendment permitted English to take the course consistent with both obligations—namely, conceding that McCoy killed the three victims.

a. After English rejected McCoy's conspiracy theory as utterly incredible, he properly, indeed commendably, refused to "advocate or passively tolerate [his] client's giving false testimony." *Nix*, 475 U.S. at 171. Counsel's duty of loyalty and zeal is "limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth," including not "taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law." *Id.* at 166. Louisiana law embodies that foundational principle in Louisiana Rules of Professional Conduct 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . ."), 3.3(b) ("A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage . . . in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."), and 3.4 ("A lawyer shall not . . . counsel or assist a witness to testify falsely").

McCoy contends that these rules did not apply here because English did not "know" with absolute certainty that McCoy's conspiracy theory was false. Pet'r Br. 36 n.6; *see also* ABA Br. 16-17. The Louisiana Supreme Court, the ultimate arbiter of the State's rules of professional conduct, *see Succession of Wallace*, 574 So.2d 348, 350 (La. 1991), disagreed with that interpretation of the Rule 1.2(d), ruling that it barred

English from presenting McCoy's testimony. *See* JA80. That conclusion was eminently reasonable.

Courts and commentators have applied "a myriad of standards for determining when an attorney 'knows' his or her client intends to testify falsely. These standards include: 'good cause to believe,' 'knowledge beyond a reasonable doubt,' 'a firm factual basis,' and 'a good faith determination' that a client intends to testify falsely[,] as well as 'compelling support' for concluding that the client will commit perjury, and 'actual knowledge' for such a conclusion." *State v. Chambers*, 994 A.2d 1248, 1260 n.13 (Conn. 2010) (citations omitted). Under all of those standards other than "actual knowledge," English "kn[e]w" that McCoy's bizarre tale was false.

English "kn[e]w" McCoy intended to present false testimony based on his review of the evidence, his review of Dr. Vigen's interviews with the alibi witnesses, and the sheer absurdity of McCoy's story. A look at a few of McCoy's supposed alibi witnesses underscores his story's obvious falsity. One alibi witness whom McCoy attempted to subpoena was Senator David Vitter, who confirmed to Dr. Vigen that he had never heard of McCoy. R514-15. Another alibi witness was Judge Shonda Stone, who confirmed she had no idea where McCoy was the day of the crime. JA726-28. Caddo Parish Deputy Virgil Roberson, another alibi witness who was also McCoy's cousin, contradicted McCoy's claims as well. JA697. Shreveport Police Officer Marcus Hines, another alleged alibi witness, likewise contradicted McCoy's assertions. JA726. Still another alibi witness was McCoy's brother

Carlos, who pleaded guilty to being an accessory to the murders. R940.

The proposition "that 'a lawyer must believe his client, not judge him,'" therefore no longer applied, for a lawyer may not "honorably be a party to or in any way give aid to presenting known perjury." *Nix*, 475 U.S. at 171.

b. English did precisely what *Nix* said counsel should do when faced with a client who intends to present false testimony. Counsel should first try to dissuade the client from pursuing that course. *Nix*, 475 U.S. at 169. If that fails, counsel may inform the court. *Id.* at 170. And if the court is unable to resolve the situation, counsel may ask to withdraw from representation. *Id.* English followed all three courses, culminating in his telling the court he would willingly honor McCoy's desire to fire him based on their "irrevocable disagreement [on] how to proceed in this case." JA458. With the trial just days away, however, the court refused to allow English to withdraw.

The issue, then, was how English could effectively represent McCoy at trial consistent with his duties to McCoy, his "conscience, the law, and his duties to the court." *Jones*, 463 U.S. at 759 (Brennan, J., dissenting). McCoy concedes that English did not have "to present perjured testimony." Pet'r Br. 36. And English could not ask the jury, in his opening and closing statements, to believe McCoy's conspiracy theory because that would "give aid to presenting known perjury." *Nix*, 475 U.S. at 171. It would also have destroyed any credibility he had with the jury. Further limiting English's options, this Court has cautioned that "[i]f there is no bona fide defense to the charge, counsel

cannot create one and may disserve the interests of the client by attempting a useless charade." *United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984).

English therefore had two basic choices. One choice, which McCoy now claims was constitutionally compelled (Br. 23, 32), was to tell the jury—in the face of overwhelming evidence and a defendant who presented an obviously false story on the stand—that the prosecution failed to meet its burden of proving that McCoy killed Gregory Lee Colston, Christine Colston Young, and Willie Ray Young. *See* Pet'r Br. 34; ABA Br. 17-18. Neither Louisiana ethical rules nor the Sixth Amendment required that strategy.

Given the unusual circumstances of this case, English could not "implement his client's directions," Pet'r Br. 35 (internal quotation marks omitted), no matter what he said in his opening and closing statements. McCoy's "directions" were to advocate the conspiracy theory, a course that (for reasons already stated) English could not pursue. McCoy's claimed right to a "personal defense" (Pet'r Br. 23) was therefore already giving way, by necessity. The "limits imposed by" several rules of professional conduct prohibited English from seeking McCoy's ultimate "objectives of representation." JA84 n.30 (holding that McCoy's "alibi defense was not ethically possible for Mr. English").

McCoy's current argument, that English had the obligation to maintain his client's innocence and simply hold the State to its burden of proof, is something McCoy never requested. McCoy did not want English to simply hold the State to its burden, but wanted him to advance a *specific* alibi defense. JA83, 398-99; *see also*

JA661-662. And McCoy's testimony did, in fact, box English in. *See* JA48 (summarizing testimony), 568-638 (transcript). Had McCoy not demanded a specific alibi defense that English believed to be unethical and illegal and insisted upon personally testifying to the albi, but only requested that his innocence be maintained, the case before this Court might be very different.

On the other side of the equation, taking steps to prevent a client from receiving the death penalty fulfills defense counsel's most fundamental obligations. *See, Nixon*, 543 U.S. at 190-91 (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 329 (1983)). Those obligations include "act[ing] with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Comments to Rule 1.3. Here, the concession defense was the best available lawful defense given the evidence. Respecting defendant autonomy does not and never has required an attorney to abandon his professional judgment and conscience.

The ABA, balancing these competing considerations, takes a different view of defense counsel's ethical obligations than the Louisiana Supreme Court. *See* ABA Br. 13-16. But, despite the tenor of the ABA's *amicus* brief, its Criminal Justice Standards do not dictate that counsel should resolve disagreements by abandoning professional judgment and pursuing a defendant's irrational and potentially illegal demands. In fact, the Standards only require consulting with the client and memorializing the disagreement. ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE

FUNCTIONS § 4-5.2(e) (4th ed. 2015). Nor do Model Rule 1.2 or its comments prescribe how disagreements in a particular case between lawyer and client are to be resolved.

Jurisdictions often differ over how ethical rules apply, even rules based on ABA Model Rules, and every case is fact sensitive. State high courts are the ultimate arbiter of the States' respective rules, not the ABA. And the Louisiana Supreme Court decision in this case definitively rejects the ABA *amicus* brief's view of how its ethical rules applied here. "[T]he fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution." *Jones*, 463 U.S. at 753 n.6.

c. English therefore employed the strategy *Nixon* blessed: "conced[ing], at the guilt phase of the trial, the defendant's commission of murder" in the hope of "sparing the defendant's life." 543 U.S. at 178. The strategy is reasonable because when the "defendant's guilt is [ ] clear," "avoiding execution [may be] the best and only realistic result possible." *Id.* (internal quotation marks omitted). Maintaining the defendant's innocence may prove "a counterproductive course." *Id.* As a former defense counsel explained, juries do not like hearing "a 'he didn't do it' defense and a 'he is sorry he did it' mitigation." *Id.* at 191 (quoting Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695, 708 (1991)). This Court also pointed to studies showing that "juries approach the sentencing phase 'cynically' where counsel's sentencing-phase presentation is logically inconsistent with the guilt-phase defense." *Id.* at 192

(quoting Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1589-1591 (1998)).

Consistent with that tactic, English creatively attempted to turn McCoy's outlandish testimony to his advantage. The theme of his opening argument was that McCoy should not receive the death penalty because, as the jury will find out when he testifies, McCoy suffers from "emotional and mental conditions." JA508-509. More specifically, McCoy "believes that everyone in this courtroom, the judge, the district attorney, myself, the Bossier Parish Police Department, the Idaho Police Department, we are all in a conspiracy to kill him." JA509.

English therefore did not "undercut McCoy's defense" (Pet'r Br. 14) when he examined McCoy. Rather, English's questions elicited answers that highlighted McCoy's delusions, as well as his suicide attempts, which assisted the defense's efforts to avoid the death penalty. In closing, English pursued the theme, stating in layman's terms that "Robert McCoy is crazy. He's delusioned. He's paranoid. He's wracked by conspiracy." JA647. As a consequence, McCoy lacked "the specific intent to commit first degree murder. . . . He is so defective mentally. You – you saw him on the stand. Robert McCoy doesn't have the mental capacity to form specific intent." JA647-648. English therefore implored the jury to find McCoy "guilty of second degree murder and . . . spend the rest of his natural life in jail." JA651.

McCoy shuts his eyes to this defense on the ground that "Louisiana does not recognize a diminished-

capacity defense independent of an insanity plea." Pet'r Br. 12. That misses the point. First off, the defense carried over to the penalty phase, when McCoy asked the jury not to impose the death penalty because of his "serious mental emotional issues" and his suicide attempts. R3718. The jury's struggle to issue a verdict and then to impose the death penalty—deliberating for more than four hours and then asking the judge when the jury is considered deadlocked—suggests the argument had an impact.

Second, although McCoy, in his petition for certiorari, purported to demean this strategy as an effort to appeal to jury nullification, that is a common defense tactic. As explained in a recent *amicus* brief, "the discretion of independent juries was one of the very causes for revolution, and it informed not only the original guarantee of a right to trial by jury in the Constitution of 1787, but also the Sixth Amendment of the Bill of Rights, which expanded that guarantee." Cato Institute *Amicus* Br. at 11, *Lee v. United States*, 582 U.S. ___ (2017) (16-327). *See also Horning v. District of Columbia*, 254 U.S. 135 (1920) (Holmes, J.) ("The jury has the power to bring in a verdict in the teeth of both law and facts.").

Louisiana law does not foreclose the tactic, even if it is in tension with La. C.Cr.P. art. 797(4), requiring jurors to accept the law given to them by the court. *See State v. Strother*, 49 So.3d 372, 380 (La. 2010) ("Louisiana's system of responsive verdicts provides juries with the plenary power of nullification to return a lesser verdict even in the face of overwhelming evidence of guilt.") (citation omitted); *State v. Porter*, 639 So.2d 1137, 1140 n.5 (La. 1994) ("Jury nullification

is a recognized practice which allows the jury to disregard uncontradicted evidence and instructions by the judge.") (citation omitted). Indeed, the Louisiana Supreme Court found that English's closing "gave the jury three options for a verdict: first degree murder, second degree murder, or manslaughter." JA95.

English admitted that McCoy killed the victims, which were only some of the elements of the crimes charged, and then steadfastly and emphatically denied another: specific intent. This was a strategic decision, which he indisputably believed to be in the best interest of his client.[4] Had English not conceded that McCoy killed the three victims, and instead exclusively held the State to its burden of proving the *actus reus*, it would have crippled this strategy, prohibiting

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[4] A leading treatise, in discussing the challenge of advising a client who the lawyer believes has diminished capacity states,

> In the end, however, the lawyer will have to process all of the clues, and the lawyer alone will have to make the judgment call how best to act "in the best interests of the client." This point is made explicit in RESTATEMENT OF THE LAW GOVERNING LAWYERS §24(2), and its Comment *d*. Indeed, the Restatement text says that the lawyer "should be guided by *the lawyer's* (reasonable) view of how the client *would* define client interests if able, *even if the client states otherwise*." ... As the Comment properly notes, the text of §24 requires that the lawyer "reasonably" come to the conclusion that an impaired client's stated views are not the views that the client would express but for the impairment. More important, the Comment states that a lawyer must investigate fully, perhaps relying on the opinions of other professionals, in order for such conclusion to qualify as "reasonable."

Gregory C. Hazard Jr., W. William Hodes, and Peter R. Jarvis, THE LAW OF LAWYERING , §19.03 (4th ed.) (emphasis in original.)

English from (1) arguing that the State had not proven intent to kill because of McCoy's obvious irrational behavior and (2) earning credibility with the jury. Instead, English pushed for a compromise verdict where the death penalty was not an option. Louisiana law did not foreclose such a defense and the jury's questions in the guilt and penalty stages show it almost worked.

All told, English's trial strategy was eminently reasonable, indeed commendable, and conformed to—in large part was compelled by—ethical guidelines, and was in all ways "consistent with the lawyer's conscience, the law, and his duties to the court." Allowing McCoy, who plainly suffered from mental and emotional deficits, to override that strategy "will not 'affirm the dignity' of a defendant." *Indiana v. Edwards*, 554 U.S. 164, 176 (2008). Rather, "insofar as [McCoy's] lack of capacity threatens an improper . . . sentence," it would "undercut[] the most basic of the Constitution's criminal law objectives, providing a fair trial." *Id.* at 176-77.

"While *Faretta* allows a defendant to have a fool for a client, 422 U.S. at 852, 95 S. Ct. 2525 (Blackmun, J., dissenting), there is nothing in its logic that commands that the defendant may also have a fool for an attorney." *Wright v. Estelle*, 572 F.2d 1071, 1073 (5th Cir. 1978) (en banc) (Thornberry, J., concurring).[5]

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[5] McCoy asserts that the deprivation of his "right to make basic decisions regarding the objectives of his defense," Pet'r Br. 19, is structural error. Pet'r Br. 38-43. Should the Court agree with McCoy that his constitutional rights were so violated, it should remand without addressing whether the error was structural or subject to harmless-error review. McCoy did not expressly present

II. *STRICKLAND* IS THE PROPER FRAMEWORK FOR ANALYZING MCCOY'S CLAIM OF ERROR.

English's decision to concede guilt should be assessed under the *Strickland v. Washington* test for ineffective assistance of counsel. McCoy reserved his *Strickland* claims for collateral review, and no state court has yet ruled on it. JA88 n.32. Here, he argues that the limited exception to *Strickland* recognized in *United States v. Cronic*, under which prejudice is presumed, applies. He is wrong. In *Florida v. Nixon*, this Court held that counsel's concession of guilt in a capital case is not subject to the *Cronic* presumption. That remains the law, McCoy's express objection to the strategy does not change the result, and none of the other facts of this case requires a different conclusion.

a. A concession strategy—even one employed over the client's objection—does not amount to a complete failure of adversarial testing of the kind identified in *Cronic*. This Court in *Nixon* rejected the argument that the *Cronic* presumed-prejudice standard should apply to a concession strategy, ruling that the defense "does not rank as a 'fail[ure] to function in any meaningful sense as the Government's adversary." 543 U.S. at 190

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that question to the Court, and his petition for certiorari did not mention the remedy issue. Nor can the remedy issue be said to be "fairly included" in the question presented. It is not a "predicate to intelligent resolution of the question on which" certiorari was granted, *Vance v. Terrazas*, 444 U.S. 252, 258-259 n.5 (1980), and is not an alternative "argument in support of" the constitutional claim presented. *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000). *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("ordinarily, this Court does not decide questions not raised or involved in the lower court").

(quoting *Cronic*, 466 U.S. at 666). To the contrary, for the reasons discussed in § I(B), *supra*, counsel "may reasonably decide to" use that strategy in capital cases. *Id.* at 191.

A client's objection has no bearing on whether it will be counterproductive to "put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation." Whether the defendant objects or not, "counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'" *Id.* (quoting *Cronic*, 466 U.S. at 656-657 n.19). In arguing otherwise, McCoy conflates his (meritless) autonomy argument with his ineffective-assistance-of-counsel argument.

b. Nor is there any other basis for concluding that *Cronic* applies here. This Court has stated that "for *Cronic*'s presumed prejudice standard to apply, counsel's 'failure must be complete.'" *Nixon*, 543 U.S. at 190 (quoting *Bell v. Cone*, 535 U.S. 685, 696-697 (2002)). "[D]efense counsel must *entirely* fail to subject the prosecution's case to meaningful adversarial testing for the *Cronic* exception to apply ... a constructive denial of counsel only in those instances where a defendant's attorney concedes the only factual issues in dispute." *Haynes v. Cain*, 298 F.3d 375 (5th Cir. 2002), 381 (emphasis in original) (citing, *inter alia*, *United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991)); *see also Darden v. United States*, 708 F.3d 1225, 1229-1231 (11th Cir. 2013); *United States v. Flores*, 739 F.3d 337, 340 (7th Cir. 2014), Easterbrook, J. ("The [*Nixon*] Court concluded that *Cronic* does not apply to situations in which defense counsel concedes a subset of the charges.") The record here, however, is replete

with evidence of English's efforts to defend McCoy and subject the State's case to adversarial testing, including:

- Presenting a defense with an overarching guilt-phase strategy designed to produce an acquittal as to the charged crime;
- Presenting a defense with an overarching mitigation-phase strategy designed to produce an acquittal of a death sentence;
- Withdrawing McCoy's *pro se* speedy trial motion to afford more time to prepare;
- Filing three writ applications at the court of appeal seeking supervisory review;
- Hiring mitigation experts, who spoke to alibi witnesses and conducted further mental evaluations;
- Filing motions in limine and successfully blocking the incriminating statement of McCoy's brother Spartacus;
- Objecting to photos of the deceased on grounds they would be unfairly prejudicial;
- Objecting to photos of Gregory Colston in the emergency room on grounds that they were cumulative and unduly prejudicial, and obtaining a concession from the defense not to use them;
- Bringing competency issues to the attention of the trial court;

- Actively engaging in jury selection, making two *Batson* challenges, and preserving them for appeal;
- Cross-examining witnesses and attempting to show lack of malice or intent;
- Presenting a mitigation expert witness who testified to a mental defect;
- Objecting to jury instructions related to aggravated burglary;
- Moving for a mistrial;
- Asking the trial court to give a deadlocked jury charge during the penalty stage.

English clearly did not abandon his client, and English's concession defense strategy did not result in a truncated proceeding. The State was "obliged to present during the guilt phase competent, admissible evidence establishing the essential elements of the crimes." *Nixon*, 543 U.S. at 188. The government retained its burden of proof, the jury was instructed on each charged offense, and the jury was instructed that counsel's statements during argument are not evidence. R3535-3546. Indeed, English sought an acquittal from the jury as to the charged crime, first degree murder. This was not an abbreviated proceeding like the one in *Brookhart v. Janis*, 384 U.S. 1 (1966). As the Louisiana Supreme Court put it, "English's concession of guilt did not render the defendant's not guilty plea meaningless, as the State was still obliged

to present evidence establishing the essential elements of the crimes charged." JA97 (citation omitted).[6]

More broadly, neither *Nixon* nor any of this Court's other cases define what exactly a concession of guilt is—whether it is a concession of every element of the charged crime, a concession of a single element of any crime (charged or responsive to the crime charged), or something in between. McCoy does not explain the scope of the rule he proposes—*i.e.*, whether no concession of guilt of *any* element may be made over the objection of the client. Although lower courts are divided on this issue, some courts have held that such partial concessions are tactical decisions and are subject to *Strickland* analysis. *Haynes*, 298 F.3d at 381 n.7) (collecting cases); *Walker v. State*, 194 So.3d 253, 282 (Ala. Crim. App. 2015); Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 102-104 nn.325, 330, 331 (2004-2005) (collecting cases).

Here, a *per se* rule would have absurd consequences. For example, if a trial has not gone well a defendant and his lawyer could conspire to manufacture structural error in bad faith by conceding guilt over his client's objection. Or, what if a lawyer seeks to assert a defense of consent to a rape charge over his client's objection where his DNA is found within the victim? In such a situation, what is a lawyer to do if the client asserts that he never touched the victim? *See* Johnson,

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[6] English's claim that he took the burden off of the jury as to a finding of second degree murder did not actually have the effect of doing so because "arguments of counsel [are] not evidence." JA647; *e.g. State v. Draughn*, 950 So.2d 583, 615 (La. 2007); *Council of New Orleans v. Washington*, 9 So.3d 854, 857 n.4 (La. 2009).

The Law's Hard Choice, *supra*, at 39-41 (providing another example).

c. McCoy attacks specific actions taken by English (Pet'r Br. 44-47), but those attacks are properly assessed under *Strickland*. For example, McCoy criticizes a sentence apiece from English's opening and closing arguments; English's refusal to issue subpoenas to alleged alibi witnesses; his telling witnesses that "Mr. McCoy wanted me to ask you some questions"; and his direct examination of McCoy. Pet'r Br. 45-46. McCoy attacks English's judgment calls in connection with his legal and ethical duties. *Id.* at 32-35. Yet those are precisely the sort of discrete objections to counsel's performance for which *Strickland* was created.

Strickland recognizes that "advocacy is an art and not a science," and that "strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based." 466 U.S. at 681. In assessing counsel's performance, *Strickland* takes into account a myriad of factors, including counsel's experience, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense. *Id.* McCoy wrongly seeks to pretermit that inquiry.

In short, "no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude

counsel must have in making tactical decisions." *Id.* at 689.

No one suggests that employing a concession strategy over the objections of a client is always reasonable or that it should be applied in anything other than rare circumstances. Determining whether this case is one of those rare cases, or whether English acted deficiently in concluding that it was, requires a careful assessment of the facts and record. Perhaps (though we doubt it) the Louisiana courts on remand will conclude that English performed deficiently in conceding guilt or in how he went about conceding guilt. But that assessment must be made under *Strickland*—as was true for Nixon's counsel.

CONCLUSION

The judgment of the Supreme Court of Louisiana should be affirmed.

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IN THE

Supreme Court of the United States

ROBERT MCCOY,
Petitioner,

v.

LOUISIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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IN THE

Supreme Court of the United States

No. 16-8255

ROBERT MCCOY,

Petitioner,

v.

LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Louisiana has no credible argument that a court may permit defense counsel to tell the jury his client is guilty over the client's objection. The Sixth Amendment guarantees the accused both the right to an attorney and the right to decide whether to admit guilt. Louisiana posits that a defendant must forgo one of those rights as the price of exercising the other. But that claim flies in the face of the Framers'—and this Court's—understanding that the defense belongs to the accused personally and that the accused is entitled to decide what the objectives of that defense should be.

Louisiana therefore attempts to change the subject. It acknowledges (at 33) that "[i]n most cases, counsel may not concede guilt over the defendant's objection," and it recognizes (at 26-27, 40) that this case "might be very different" if McCoy had merely "requested that his innocence be maintained." Louisiana nonetheless contends that in *this* case, McCoy's counsel

was ethically obligated to concede guilt because—in counsel's view—it was the strategy most likely to spare McCoy's life and because—again, in counsel's view—McCoy sought to advance an alibi defense that was not credible.

Louisiana's argument misrepresents both McCoy's claim and the facts of this case. McCoy is indeed arguing only that "his innocence [should have been] maintained," Resp. Br. 26, 40, and that the court should not have allowed his counsel to tell the jury he was guilty. McCoy does not contend here that his counsel was obligated to present any particular testimony or evidence, let alone present a defense that would "violate the lawyer's legal and ethical obligations." *Cf.* Resp. Br. i.

A lawyer can never be obligated to tell the jury his client is guilty; to the contrary, doing so over the client's objection breaches both the Sixth Amendment and applicable ethics rules. Moreover, McCoy's counsel never expressed any concern that honoring McCoy's decision would have raised perjury concerns, as Louisiana contends. And even if he had, admitting a client's guilt is never a permissible response to doubts about the truth of the client's statements.

Louisiana also argues that counsel who believes that only an admission of guilt can save his client's life must make that admission even over his client's express objection. But the Sixth Amendment gives the accused the right to decide for himself whether he values his day in court and the possibility of acquittal—even if remote—more than the putative advantages a concession of guilt might provide at sentencing. Once the defendant has made that decision, counsel must honor it. The trial court violated McCoy's Sixth Amendment rights by allowing his counsel to admit his

guilt. Louisiana does not dispute that such an error is structural error requiring a new trial.

This case is not about the ineffective assistance of counsel or whether an admission of guilt might sometimes be a reasonable strategy. The client's autonomy, not the lawyer's competence, is at issue. But even if this were an ineffective-assistance case, McCoy would be entitled to a new trial. When McCoy's lawyer told the jury McCoy was guilty of murder, he vitiated the "meaningful adversarial testing" of the prosecution's charges to which McCoy was entitled. *United States* v. *Cronic*, 466 U.S. 648, 656 (1984). Whatever doctrinal framework applies, McCoy deserves a trial in which his lawyer acts as his advocate and not his prosecutor.

ARGUMENT

I. THE TRIAL COURT VIOLATED MCCOY'S CONSTITUTIONAL RIGHTS BY ALLOWING COUNSEL TO ADMIT GUILT OVER MCCOY'S OBJECTION

A. McCoy Did Not Forfeit His Right To Maintain His Innocence At Trial By Accepting The Assistance Of Counsel

Louisiana concedes (at 28) that, when a defendant chooses to represent himself, he has the right to decide whether to maintain his innocence and seek acquittal or to admit his guilt to the jury in pursuit of some other objective. But, Louisiana contends, a defendant who accepts the assistance of counsel forfeits that right. The decision whether to admit guilt becomes a matter of trial tactics for the attorney, and if counsel decides that admitting guilt serves counsel's conception of the client's best interest, he may do so even over the client's objection. Louisiana offers no genuine support for that startling proposition, which cannot be reconciled

with the understanding of the Sixth Amendment that has prevailed since the Founding.

1. The Constitution guarantees a criminal defendant both the right to the assistance of counsel and the right to insist that the prosecution prove his guilt beyond a reasonable doubt at a trial that conforms to the Constitution's requirements. The former right is designed to effectuate the latter; the Sixth Amendment does not require the defendant to choose between them.

The purpose of the right to counsel is not to displace other trial rights, but "to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland* v. *Washington*, 466 U.S. 668, 685 (1984). Counsel's "presence is essential" precisely because the right to counsel is "the means through which the other rights of the person on trial are secured." *United States* v. *Cronic*, 466 U.S. 648, 653 (1984). "Without counsel the right to a fair trial itself would be of little consequence," as "it is through counsel that the accused secures his other rights." *Kimmelman* v. *Morrison*, 477 U.S. 365, 377 (1986). Accordingly, "absent a voluntary plea of guilty, we ... insist that [defense counsel] defend his client whether he is innocent or guilty." *United States* v. *Wade*, 388 U.S. 218, 257 (1967) (White, J., dissenting in part and concurring in part); *see also Lafler* v. *Cooper*, 566 U.S. 156, 169 (2012). Defense counsel must "put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth." *Wade*, 388 U.S. at 258 (White, J., dissenting in part and concurring in part).

Consistent with "'that respect for the individual which is the lifeblood of the law,'" a defendant may

choose to represent himself rather than accept representation by counsel. *Faretta* v. *California*, 422 U.S. 806, 834 (1975). But this respect for the defendant's autonomy in controlling his defense does not disappear if a defendant invokes his right to counsel. Pet. Br. 24-30. Because it is still "[t]he defendant, and not his lawyer" who bears the consequences of a conviction, *Faretta*, 422 U.S. at 834, the defendant who exercises his right to counsel retains the basic right to control the objectives of his defense. "[T]he [Sixth] Amendment speaks of the 'assistance' of counsel" because it contemplates that "the accused, and not a lawyer, is master of his own defense." *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 382 n.10 (1979); *see Faretta*, 422 U.S. at 819-820; Criminal Bar Ass'n of England & Wales Br. 3-5; Cato Br. 5-14.

Even when represented by counsel, the accused thus retains "the ultimate authority to make certain fundamental decisions regarding the case," including "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). The decision whether to admit guilt is equally fundamental to the personal defense guaranteed by the Sixth Amendment, and, like those other decisions, must belong to the defendant, not counsel. Pet. Br. 22-27. When the defendant has expressly made and communicated that decision, counsel cannot override it—even if counsel believes the decision is unwise.

2. Louisiana acknowledges that certain decisions remain the defendant's to make even where the defendant has counsel, but asserts without explanation that the decision whether to admit guilt is not among them. Instead, Louisiana equates that choice with the ordinary "'tactical decision[s]'" made during trial that

are committed to counsel's discretion and do not require the client's approval. Resp. Br. 28-29. But Louisiana's examples (at 29) of such decisions—deciding to "forgo cross-examination" or "not to put certain witnesses on the stand"—are categorically different from a decision to tell the jury one's client is guilty. *See* Pet. Br. 25-27. A lawyer may decide what trial tactics would best serve the client's goal of acquittal—for example, by choosing which witnesses to call or which lines of questioning to pursue. But the lawyer may not decide, contrary to his client's express instructions, that acquittal is not the right goal and instead admit guilt.

It does not matter if the lawyer's intentions are benign or his judgment sound. "Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people." *Martinez* v. *Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in the judgment). A defendant may decide, in the exercise of his autonomy, that his day in court and the chance of acquittal—even if remote—are worth more to him than the speculative advantages a concession of guilt might provide at sentencing. *See Lee* v. *United States*, 137 S. Ct. 1958, 1968-1969 (2017). That judgment is not legal or tactical, but value-laden and personal. And it is the defendant's to make.

Louisiana's contrary vision (at 27)—that the lawyer knows better than the client whether it is in the client's "best interest" to deny guilt and pursue acquittal or to admit guilt in the hope of a more lenient sentence—flouts this Court's decisions and the original understanding of the Sixth Amendment. "[T]he accused, and

not a lawyer, is master of his own defense," *Gannett*, 443 U.S. at 382 n.10, and must at a minimum be entitled to determine whether to seek acquittal in the first place. As McCoy has explained (at 27-30)—and Louisiana does not contest—the notion that a lawyer could veto a client's attempt to assert his innocence was a signal feature of the Star Chamber, repugnant to the Framers, which the common law, colonial practice, and the Sixth Amendment all repudiated.

Louisiana suggests (at 2, 45) that the trial court correctly allowed English to override McCoy's decision because McCoy's "judgment was impaired" by "mental and emotional deficits." But McCoy was found competent to stand trial and competent to represent himself. Pet. Br. 4-5. English himself elicited testimony that McCoy suffered from no mental impairment that would render him unable to stand trial. JA688-689. Louisiana even argued below, when it was convenient to do so in opposing McCoy's motion for a new trial, that there was no doubt as to McCoy's competence, R3796-3797, and the trial court again held he was competent, R3799-3800. And notwithstanding English's many dramatic assertions that his client was "crazy," *e.g.*, JA504, JA509, English never asked the court to revisit McCoy's competence. If English believed McCoy was not capable of making rational decisions, the proper course would have been to seek a new competency hearing—not to tell the jury McCoy was guilty. McCoy was deemed competent, and a defendant competent to stand trial and represent himself is competent to decide whether to admit guilt.[1]

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[1] The Restatement guideline on clients with diminished capacity is thus inapposite because McCoy was capable of making "adequately considered decisions" about his own objectives. *Re-*

3. Louisiana's reliance (at 30-32) on *Florida* v. *Nixon*, 543 U.S. 175 (2004), fails. Pet. Br. 30-32. *Nixon* addressed whether counsel's concession of guilt requires a new trial where counsel has proposed that strategy to his client and the client has refused to respond, thereby implicitly acquiescing. *See* 543 U.S. at 181, 192. Those are not the facts here, and that is not the question presented.

The problem here is not that English failed to obtain McCoy's express approval of his decision to admit guilt; the problem is that McCoy expressly and repeatedly rejected any admission of guilt, but the trial court nonetheless allowed English to tell the jury McCoy was guilty. An[1] whereas in *Nixon* the client complained about the admission only after trial, here McCoy rejected English's assertion of his guilt at every opportunity, before and during trial, both in conference with his lawyer and in open court. Pet. Br. 8-12, 16.

Louisiana suggests (at 29-30) that because McCoy "disagreed with English's defense strategy as early as January 2011," his objections came too late. But it was not until July 12, 2011—sixteen days before trial, in a meeting that Louisiana omits completely from its statement of facts (at 13-15)—that English told McCoy for the first time that he intended to admit McCoy's guilt to the jury. JA286. McCoy immediately attempted to discharge English and have him replaced, and

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statement (Third) of the Law Governing Lawyers ("*Restatement*") §24(1); *cf.* Resp. Br. 44 n.4. His "insistence on a view of [his] welfare that [English] consider[ed] unwise" did not establish otherwise. *Restatement* §24 cmt. c. Moreover, the Restatement makes clear that even if a client has diminished capacity, the lawyer should still "function as advocate and agent of the client, not judge or guardian." *Id.*

raised the issue with the court at the next scheduled hearing, two days before trial. Pet. Br. 9-10. The court erred in rejecting those diligent efforts.[2]

Enforcing McCoy's Sixth Amendment rights here does not require recognizing any "new category of trial-related decisions ... for which the client's consent is not needed, but which may not be made over his express objection." Resp. Br. 32-33. As McCoy has explained (at 30-31), this Court has recognized that there are certain basic trial rights that cannot be denied by counsel or the court once the defendant expressly invokes them, but can be implicitly waived by the defendant's silent acquiescence in counsel's or the court's actions. Those rights include the right to represent oneself, to testify, and to appeal. Pet. Br. 31 (citing cases). Like those other basic trial rights, the right to decide whether to admit guilt may be expressly invoked or

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[2] Louisiana's implication that McCoy knew of English's intent to admit guilt months before trial is not the only liberty Louisiana takes with the record. Among other examples, Louisiana asserts (at 26, 36-38, 40) that English considered McCoy's testimony to be perjury even though English never expressed that concern, *infra* at 13; it asserts (at 11) that a January 2011 hearing "devolved into an argument between McCoy and English" when no such thing occurred, *see* JA346-359; and it asserts (at 5, 37-38) that McCoy's brother Carlos pleaded guilty to helping McCoy escape Bossier City the night of the killings, when in fact he pleaded *not* guilty, R940.

Regardless, the strength of the prosecution's evidence is irrelevant to the question presented. *Cf.* Resp. Br. 3-5. It does not matter whether English's strategy was "reasonable" in light of the State's evidence, because the constitutional violation here was the usurpation of McCoy's right to decide whether to admit guilt. In any event, the record cannot show how strong the prosecution's case would have been if English had thoroughly investigated and actually challenged the prosecution's evidence.

implicitly waived. *See id.* McCoy invoked that right here, and the trial court should have ensured its protection.

4. Contrary to Louisiana's unsupported suggestion (at 28-29, 50), the adversary process can—and does—function effectively when defendants retain the right to decide whether to admit guilt. Many jurisdictions have considered this issue and barred defense counsel from admitting the defendant's guilt in a capital case over the defendant's objection, *e.g.*, *Cooke* v. *State*, 977 A.2d 803, 847 (Del. 2009); *see also* 3 LaFave et al., *Criminal Procedure* §11.6(a), at 904-905 & n.30 (4th ed. 2015); Cato Br. 20, yet Louisiana has identified none of the problems it imagines here in those jurisdictions.

Louisiana's speculation (at 50) that defense counsel might "conspire" with a defendant to "manufacture structural error in bad faith" through an admission of guilt relies on the baseless premise that defense counsel would risk punitive sanctions for such misconduct. In any event, no such conspiracy can arise where, as here, the defendant informs the court before trial of his objection.

Louisiana's other hypothetical (at 50) actually highlights the importance of the defendant's right to decide whether to admit guilt. Louisiana suggests that the constitutional rule McCoy relies on would have the "absurd consequence[]" of barring defense counsel from asserting a consent defense for a rape defendant who denies contact with the victim. That question is not presented here, since Louisiana's hypothetical lawyer is at least pursuing the client's objective of acquittal. But the notion that a lawyer should refrain from telling the jury that his client committed an act that the client denies is hardly absurd. It instead reflects the lawyer's

role to "hold the prosecution to its heavy burden of proof" when the defendant has decided to contest guilt, *Cronic*, 466 U.S. at 656 n.19, and "the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust" that underlie the defendant's right to counsel, *Luis* v. *United States*, 136 S. Ct. 1083, 1089 (2016) (plurality). Louisiana suggests that defense counsel should betray a client who asserts his innocence if the prosecution has evidence, such as DNA in a rape case, that appears sufficiently strong. But as this Court has recognized, no evidence is uniquely infallible, *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 318 (2009)—including DNA evidence in rape cases, *see, e.g.*, *Williams* v. *Illinois*, 567 U.S. 50, 118-119 (2012) (Kagan, J., dissenting). Louisiana would deny the defendant—particularly the indigent defendant who lacks the means to hire counsel of choice—the opportunity to challenge such evidence and to demand that the prosecution prove his guilt of all the elements of the crime, unless the defendant relinquishes the right to counsel. Yet it is precisely so that defendants can challenge evidence and "'meet the case of the prosecution'" that the Sixth Amendment secures to all defendants the assistance of counsel. *Strickland*, 466 U.S. at 685.

B. English's Ethical Duties Did Not Permit, Much Less Require, Him To Admit McCoy's Guilt

Perhaps recognizing the weakness of its principal argument, Louisiana obfuscates both the facts of the case and the question presented. Louisiana admits (at 33) that "[i]n most cases, counsel may not concede guilt over the defendant's objection," and recognizes (at 40) that had McCoy "only requested that his innocence be

maintained, the case before this Court might be very different." What makes this case special, Louisiana claims (at 40), is that English was ethically obligated to tell the jury McCoy was guilty because McCoy "demanded a specific alibi defense that English believed to be unethical and illegal." That is not McCoy's argument here. Nor is it a concern English himself ever suggested. Instead, English claimed he had an ethical duty to try to save his client's life that required him to override McCoy's choice to deny guilt. But neither Louisiana's purported ethical obligation nor English's expressed reason could justify the trial court's decision to permit English to admit McCoy's guilt over his objection.

1. Louisiana's claim (at 35-40) that English was ethically obligated to refrain from asserting "a defense based on false testimony" is a red herring. McCoy does not argue before this Court that English was required to introduce any specific testimony, evidence, or defense theory that English believed was false. To hold the prosecution to its proof and avoid the constitutional violation at issue here, English was not required to present any specific defense. He was required simply to refrain from asserting his client's guilt to the jury.

The ethics rules recognize the difference. They never prohibit defense counsel from contesting guilt, even when defense counsel knows the defendant is guilty. *See* Pet. Br. 33-34; Professors Br. 25-26; *see also Wade*, 388 U.S. at 257 (White, J., dissenting in part and concurring in part). To the contrary, Model Rule 3.1 and the identical Louisiana Rule 3.1 recognize that defense counsel may "so defend the proceeding as to require that every element of the case be established," even when there is no "basis in law and fact for doing so that is not frivolous." *See also* Model Rule 3.1 cmt. 3

(lawyer's ethical obligation not to make a frivolous defense is subordinate to defendant's constitutional rights).

Like the Louisiana Supreme Court, Louisiana relies on various rules embodying the principle that defense counsel shall not assist a client in fraudulent conduct or false testimony. Resp. Br. 36 (citing Rules 1.2(d), 3.3(b), 3.4). But English never claimed that his admission of McCoy's guilt was driven by an ethical duty to remedy or avoid perjurious testimony. To the contrary, English was "certain" that McCoy sincerely believed in his innocence, JA285-286, and thus did not consider McCoy's testimony to be perjury. *See also* JA564. In any event, defense counsel does not facilitate perjury or other criminal conduct by simply refraining from admitting the defendant's guilt. *See* Pet. Br. 33-34; Professors Br. 25-26.

McCoy's testimony did not "box" English into admitting guilt. Resp. Br. 40. Precisely the opposite is true. English admitted McCoy's guilt in his opening statement, *before* McCoy elected to testify. *See* JA47-48; JA504, JA508-511, JA568-638. Had English not done so, McCoy would not have been forced to take the stand to assert his innocence. Instead, English's admission effectively compelled McCoy to abandon his right against self-incrimination. *See* Pet. Br. 46.

Nor, as Louisiana concedes (at 37), did English have actual knowledge that McCoy's testimony was false. Both the Model Rules and the Louisiana Rules are clear that when "the testimony of a defendant in a criminal matter" is at issue, actual knowledge of perjury is required to raise any ethical concern; a "reasonabl[e] belie[f]" that the defendant's testimony may be false is not enough. Rule 3.3(a)(3); *see* Rule 1.0(f)

("'knows' denotes actual knowledge"); *see also* Model Rule 3.3 cmt. 9 ("Because of the special protections historically provided criminal defendants, ... this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false."); Pet. Br. 36 n.6; ABA Br. 16-17; Professors Br. 22-24.[3]

Even if English had actually known that McCoy's testimony was false, the ethics rules would not have permitted—much less required—English's admission of guilt to the jury. If counsel can neither dissuade a defendant from testifying falsely nor withdraw from the representation, he can bring the matter to the trial court's attention. *See* Model Rule 3.3 cmt. 7 (court may require "counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false"); *see also Nix* v. *Whiteside*, 475 U.S. 157, 174 (1986). But "the advocate must make such disclosure to the tribunal," not to the jury, and it "is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing." Model Rule 3.3 cmt. 10. Indeed, *Nix* makes clear that counsel may not disclose even a "client's admission of guilt." 475 U.S. at 174; *cf.* Resp. Br. 38. And if counsel may not disclose a client's admission of guilt, he certainly may

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[3] Louisiana says (at 37) some States use different standards for determining when an attorney "knows" his client intends to testify falsely, but Louisiana Rules 1.0(f) and 3.3(a)(3) are identical to the Model Rules, and, as the very opinion Louisiana cites explains, federal law requires "actual knowledge" that the defendant intends to commit perjury. *State* v. *Chambers*, 994 A.2d 1248, 1260 (Conn. 2010).

not do what English did—admit McCoy's guilt to the jury even though McCoy had consistently maintained his innocence. Instead, English should have refrained from telling the jury McCoy was guilty, and the trial court should have ensured that he did so.

2. Louisiana's attempt to justify English's admission as a reasonable effort to avoid the death penalty also fails. McCoy's avowed objective was to maintain his innocence and seek acquittal. No rule of ethics allowed English to reject that objective and admit guilt in pursuit of his own view of McCoy's best interests. As Louisiana concedes, the ethics rules require a lawyer to "abide by a client's decisions concerning the objectives of representation." Resp. Br. 34 (quoting Rule 1.2(a)). Louisiana notes that the client may not choose an objective outside "the limits imposed by law and the lawyer's professional obligations," Resp. Br. 34 (quoting Model Rule 1.2 cmt. 1), but seeking acquittal can never be an unlawful or unethical objective. *See* Pet. Br. 33-35; Professors Br. 25-26.

The lawyer's obligation to act with "'commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf'" also does not permit the lawyer to substitute his judgment for the client's assessment of his own best interests. *Cf.* Resp. Br. 40 (quoting Model Rule 1.3 cmt. 1). Rather, counsel must "take whatever lawful and ethical measures are required to vindicate [the] *client*'s cause or endeavor." Model Rule 1.3 cmt. 1 (emphasis added). The ABA's Criminal Justice Standards for the Defense Function similarly explain that defense counsel should ask what "the client's" objectives are at the outset of the repre-

sentation, and determine "how to fulfill them," Standard 4-3.3(a); *see* Standard 4-3.1(b); ABA Br. 13-14.[4]

Louisiana again invokes *Nixon*, asserting (at 41) that it "blessed" English's strategy. No one disputes that conceding guilt can be a reasonable trial strategy in a death-penalty case. But it is the client—not the lawyer—who is entitled to make that choice. *Nixon* did not suggest that any ethics rule compelled counsel to pursue that strategy, let alone over the defendant's objection.

3. Finally, Louisiana mischaracterizes what English actually did. Louisiana suggests (at 44) that English did not concede McCoy's *guilt*, but instead reasonably believed it would serve his client's best interests to admit "some of the elements of the crime charged." But the premise of the question presented here is that English did "concede [McCoy's] guilt," Pet. i, and Louisiana waived its present argument by failing to object to that premise in its brief in opposition.

In any event, Louisiana's assertion is wrong. As Louisiana concedes, English did not merely admit an element of the offense, but told the jury outright that "'[McCoy] [wa]s guilty of second degree murder.'" Resp. Br. 18 (quoting JA651). He charged the jury: "[Y]ou have to find that ... second degree murder is appropriate and that Robert McCoy [should] spend the rest of his natural life in jail." JA650. When done over

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[4] Ironically, the Louisiana Supreme Court itself has held that at the penalty phase, counsel is bound by a defendant's decision not to present any defense, *see, e.g.*, *State* v. *Bordelon*, 33 So. 3d 842, 863-865 (La. 2009); *State* v. *Felde*, 422 So. 2d 370, 394-395 (La. 1982), in sharp contrast to Louisiana's position here that, at the guilt phase, counsel may override a defendant's decision to assert his innocence and defend the charges against him.

the client's objection, admitting guilt of second-degree murder is no more constitutionally permissible than admitting guilt of first-degree murder. Moreover, English offered no cognizable defense to first-degree murder, instead relying on a diminished-capacity defense that Louisiana does not dispute was legally unavailable. *See* Pet. Br. 12, 47. In every meaningful sense, the trial court thus allowed English to concede McCoy's guilt of first-degree murder as well, in violation of McCoy's constitutional rights.

C. The Trial Court's Error Entitles McCoy To A New Trial

McCoy informed the court both before and during trial that he objected to the admission of guilt, but the court permitted English to admit his guilt anyway. JA455-456, JA468-469, JA505-508. The court thus deprived McCoy of his right to decide for himself whether to admit guilt or maintain his innocence, entitling McCoy to a new trial. Pet. Br. 38-43; *see Weaver* v. *Massachusetts*, 137 S. Ct. 1899, 1908 (2017); *cf. Holloway* v. *Arkansas*, 435 U.S. 475, 488 (1978) ("reversal is automatic" when defense counsel alerts trial court to a conflict of interest and court nevertheless "improperly requires joint representation"); Cato Br. 11-14. The constitutional violation was "complete" upon the deprivation of that right, regardless of whether McCoy also suffered a violation of his separate right to the effective assistance of counsel, *see United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 144-148 (2006), or whether English's admission affected the verdict, *see id.* at 148-151. Like the rights to counsel of choice, *id.* at 144-151, and to self-representation, *see McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n.8 (1984), the right exists to preserve the personal defense guaranteed by the Sixth Amendment.

Strickland's prejudice standard and the harmless-error inquiry are each inapt to protect that independent Sixth Amendment interest.

Louisiana does not dispute that the constitutional violation McCoy asserts amounts to structural error. Instead, it suggests in a footnote (at 45-46 n.5) that this Court should not address whether the error is structural or subject to harmless-error review because McCoy did not present or mention "the remedy issue" in his petition for certiorari. That is incorrect. McCoy claimed below that the trial court's error in permitting English's admission of guilt required reversal of his conviction and entitled him to a new trial. R842; *see also* JA50-51. The Louisiana Supreme Court rejected that claim. JA78-86, JA206. And McCoy's petition for certiorari sought "revers[al] [of] his convictions and sentences" in light of the "violation of his Sixth and Fourteenth Amendment rights." Pet. 4. McCoy's entitlement to a new trial was thus preserved below and is squarely before this Court.

In any event, Louisiana never suggested below that the error here could be excused as harmless under *Chapman* v. *California*, 386 U.S. 18 (1967), and makes no attempt to do so before this Court. *Cf.* Resp. Br. 45-46 n.5; Resp. La. S. Ct. Br. 11-20. To the contrary, Louisiana stresses (at 18-19, 20-21) that the jury struggled to reach a verdict as to both guilt and sentence. As McCoy has explained (at 41-43), no harmlessness showing could be made. Accordingly, the only alternative to ordering a new trial would be to force McCoy "to endure yet more time on Louisiana's death row in service of a conviction that is constitutionally flawed." *Wearry* v. *Cain*, 136 S. Ct. 1002, 1008 (2016) (per curiam). Louisiana offers no lawful justification for that result, and there is none.

II. English's Admission Of Guilt Over McCoy's Objection Constituted Ineffective Assistance Requiring A New Trial

As the foregoing demonstrates, it is irrelevant whether English's admission was a reasonable strategy. The error McCoy challenges here is not the unreasonableness of counsel's strategy, but the trial court's decision permitting counsel to admit McCoy's guilt over his objection, in violation of McCoy's Sixth Amendment right to decide for himself whether to make such an admission or instead pursue acquittal. That is not a claim of ineffective assistance.

But even if the Court viewed this case through the lens of ineffective assistance, McCoy would still be entitled to a new trial because English "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. Louisiana argues that *Cronic* does not apply because English did not completely "abandon" McCoy and because *Nixon* established a blanket rule that defense counsel's admission of guilt cannot be *Cronic* error. Neither contention is correct.

1. *Cronic* is not limited to cases where defense counsel entirely "abandon[s]" the defendant or allows "a truncated proceeding." Resp. Br. 49. Under *Cronic*, once McCoy decided to plead not guilty, the Sixth Amendment required English to subject the prosecution's charges to "meaningful adversarial testing" and to "hold the prosecution to its heavy burden of proof beyond reasonable doubt." 466 U.S. at 656 & n.19. By admitting McCoy's guilt and providing no legally cognizable defense, English did the opposite. His failure resulted in a total breakdown of the adversary process

and rendered the adjudication of McCoy's guilt "presumptively unreliable." *Id.* at 659.[5]

Louisiana cites (at 48-49) various actions that it asserts English took on McCoy's behalf, but its list only confirms how thoroughly English failed to function as McCoy's advocate and undermined McCoy's trial rights.

For example, Louisiana claims (at 48) that English "[p]resent[ed] a defense with an overarching guilt-phase strategy designed to produce an acquittal as to the charged crime." That is wrong. As Louisiana acknowledges, English urged the jury to find McCoy "guilty of second degree murder" and presented no legally available defense to first-degree murder. Resp. Br. 18 (quoting JA651). Louisiana suggests (at 43) that jury nullification remained a possibility. But jury nullification is always a possibility; by itself, it cannot constitute the "meaningful adversarial testing" the Constitution demands. *Cronic*, 466 U.S. at 656.

Louisiana's assertion (at 48) that English brought "competency issues to the attention of the trial court" is supremely ironic given that English never asked the

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[5] Louisiana's contention (at 51) that *Strickland* applies to "McCoy's attacks [on] specific actions taken by English" misconstrues McCoy's argument. For purposes of this direct appeal, *see* Pet. Br. 43 n.9, English was ineffective because of one action: his admission of guilt. His other actions taken in furtherance of that admission illustrate the extent to which the admission caused the proceeding to lose "its character as a confrontation between adversaries." *Cronic*, 466 U.S. at 657. Louisiana's assertion (at 50 n.6) that English could not actually relieve the prosecution's burden of proof (despite telling the jury that he did) similarly misses the point. English's statement to the jury demonstrates how completely he abandoned meaningful testing of the prosecution's charges.

court to revisit its finding that McCoy was competent and, indeed, elicited testimony that he was competent. *See* Pet. Br. 5-10; JA 688-689. Louisiana's praise (at 49) of English's cross-examinations ignores that English's most effective cross-examination may have been that of his own client, as he eviscerated McCoy's right to remain silent or to take the stand in his own defense. Pet. Br. 46. And Louisiana's suggestion that English developed, investigated, and presented a mitigation strategy designed to secure a life sentence blinks reality: English presented no mitigation witnesses at all, except for the psychologist who had already gone on record to opine that English's mitigation theory was factually baseless. Pet. Br. 16-17, 47. In short, none of these actions Louisiana cites supplied the meaningful adversarial testing that English's admission of guilt abandoned.

2. *Nixon* did not hold that "counsel's concession of guilt in a capital case is not subject to the *Cronic* presumption." Resp. Br. 46. It held that the presumption does not apply when the defendant acquiesces in the decision to admit guilt. 543 U.S. at 192. Given McCoy's explicit objection to the admission of guilt, *Nixon* does not control, and English's failure to contest the prosecution's charges was *Cronic* error.

Contrary to Louisiana's contention (at 47), McCoy's objection makes all the difference. *See Gonzalez* v. *United States*, 553 U.S. 242, 254 (2008) (Scalia, J., concurring in the judgment); *Brookhart* v. *Janis*, 384 U.S. 1, 6-7 (1966). However competent defense counsel might—or might not—otherwise be in keeping the defendant from death row, he does not render the effective assistance the Sixth Amendment requires if he does not contest the prosecution's charges and refrain from admitting guilt when the defendant has instructed him to do so. Even Clarence Darrow could not repre-

sent McCoy effectively by conceding McCoy's guilt over his objection. When Darrow famously conceded Leopold and Loeb's guilt to keep them from death row, *see Nixon*, 543 U.S. at 192, he did so only at sentencing, after the defendants had already pleaded guilty. *See Attorney for the Damned: Clarence Darrow in the Courtroom* 18 (Weinberg ed. 2012). English's admission was not in that tradition. Rather, English subverted the Sixth Amendment's guarantee that where a defendant decides to contest his guilt, the defendant has the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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JANUARY 2018

No. 16-8255

In the Supreme Court of the United States

ROBERT LEROY MCCOY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF OF ALABAMA, ARKANSAS, IDAHO, INDIANA, KANSAS, MONTANA, NEVADA, SOUTH CAROLINA, TENNESSEE, UTAH, AND WYOMING AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether it is unconstitutional for defense counsel to admit an accused's guilt to the jury over the accused's express objection.

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INTRODUCTION AND INTEREST OF AMICI CURIAE

The amici States prosecute crimes and incarcerate criminals, so they have two countervailing interests implicated by the question presented in this case. On the one hand, the States have an interest in the finality of state-court criminal convictions, which would be undermined by the per se reversal of convictions without a showing of prejudice. On the other, the States have an interest in maintaining society's "high degree of confidence in its criminal trials." *Herrera v. Collins*, 506 U.S. 390, 420 (1993) (O'Connor, J., concurring). This interest compels the States to ensure that defendants who choose not to represent themselves receive effective, professionally competent legal representation.

The amici States believe this Court's decisions in *Faretta v. California*, 422 U.S. 806 (1975), and *Strickland v. Washington*, 466 U.S. 668 (1984), already strike the right balance between these two interests when a criminal defendant disagrees with his lawyer's trial strategy. If the defendant disagrees with his lawyer's proposed strategy *before trial*, *Faretta* provides that the defendant may reduce his lawyer to standby counsel and represent himself. If the defendant disagrees with his lawyer's strategic decisions *after trial*, *Strickland* gives him the right to challenge his conviction on the grounds that his counsel's unreasonable strategy prejudiced his defense. These well-worn precedents protect the defendant's right to the assistance of counsel without disrupting the general rule that a lawyer "has—and

must have—full authority to manage the conduct of the trial." *Taylor v. Illinois*, 484 U.S. 400, 418 (1988).

Unsatisfied with the balance struck in *Faretta* and *Strickland*, the petitioner proposes a third way: a new right that allows a defendant to compel his lawyer to contest all the elements of an offense, even if the lawyer believes that strategy is unreasonable and detrimental to his client's interests. This proposed rule undermines the States' interest in finality without any countervailing benefit to the accuracy or fairness of criminal trials. In practice, it would be difficult to administer; limiting this rule to the supposedly narrow category of admissions of guilt would be challenging at best. In short, this rule is a solution in search of a problem. The Court should reject it and simply leave the law in its current state.

To be clear, the amici take no position on how *Faretta* and *Strickland* would apply to the facts of this case. Although the defendant apparently asked to hire a different lawyer or to represent himself before trial, the trial court denied those requests. Moreover, despite trial counsel's reasonable strategic decision to concede several elements of the offense at the guilt phase, he was allegedly unprepared to make a robust case for leniency at the penalty phase. It may well be, therefore, that the petitioner has a strong case for reversal under existing precedents. But on the question before this Court, the Court should not let these allegedly bad facts make especially bad law. The Court should affirm the lower court.

SUMMARY OF ARGUMENT

In a capital trial, particularly when there is overwhelming evidence of the defendant's guilt, partial concession of guilt can be a reasonable strategic decision. By admitting to incontrovertible facts, defense counsel builds credibility with the jury, allowing counsel to argue a defense of diminished capacity or to present an effective mitigation case. Sometimes, as in the present matter, defense counsel may reasonably believe that the evidence and his obligations to his client and the trial court prevent him from pursuing any other strategy.

When a defendant disagrees with counsel's decision to concede guilt, however, he has two options. First, pursuant to *Faretta v. California*, 422 U.S. 806 (1975), he may reduce his lawyer's role to standby counsel prior to trial and represent himself. Second, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), he may raise a claim of ineffective assistance of counsel after trial. These cases—*Faretta* and *Strickland*—effectively protect both the defendant's right to counsel and the rule that a lawyer "has—and must have—full authority to manage the conduct of the trial." *Taylor v. Illinois*, 484 U.S. 400, 418 (1988).

The rule for which the petitioner now argues—that a defendant may prevent his lawyer from conceding guilt, even if counsel believes that the defendant's alternative strategy is unreasonable and detrimental to his case—undermines the *Faretta/Strickland* framework and would be unwieldy, if not impossible, to administer. Therefore, the Court should reject this

proposed rule and leave the law in its current state, which amply protects defendants' rights.

ARGUMENT

I. It is appropriate for a criminal defense attorney to concede one or more elements of an offense in the face of overwhelming evidence.

In any criminal prosecution, defense counsel must play the hand dealt by the evidence, testimony, and his client's explanation of events. While some hands are clear winners, others must seem to have been drawn from a stacked deck, leaving counsel with few options and almost no chance of success. In the latter case, sometimes the most effective strategy is to concede one or more elements of an offense. This is especially true in capital cases, where often the only point of the proceeding is to determine whether the defendant will receive a punishment of life without parole or of death.

A. Conceding the elements of an offense is often the best strategy.

This Court has recognized that in a difficult case, conceding guilt to a lesser charge may be the most logical strategic decision. Considering the particular stakes of a capital trial, "the gravity of the potential sentence . . . and the proceeding's two-phase structure vitally affect counsel's strategic calculus," and "'avoiding execution [may be] the best and only

realistic result possible.'" *Florida v. Nixon*, 543 U.S. 175, 190–91 (2004) (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.9.1, Commentary (rev. ed. 2003), reprinted in 31 HOFSTRA L. REV. 913, 1040 (2003)). Other federal and state courts have made similar acknowledgments of the reasonableness of strategic concession.[1] Even

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[1] *See, e.g.*, *Darden v. United States*, 708 F.3d 1225 (11th Cir. 2013) (rejecting contention that strategic concession of guilt triggers presumption of prejudice under *United States v. Cronic*, 466 U.S. 648 (1984), "even if defense counsel's strategy to concede guilt was a reasonable, even excellent one"); *Haynes v. Cain*, 298 F.3d 375, 381 (5th Cir. 2002) ("[W]hen counsel fails to oppose the prosecution's case at specific points or concedes certain elements of a case to focus on others, he has made a tactical decision."); *Lingar v. Bowersox*, 176 F.3d 453, 459 (8th Cir. 1999) ("[T]he decision to concede guilt of the lesser charge of second-degree murder was a reasonable tactical retreat rather than a complete surrender."); *Underwood v. Clark*, 939 F.2d 473 (7th Cir. 1991) ("It is [not a forced guilty plea] if in closing argument counsel acknowledges what the course of the trial has made undeniable—that on a particular count the evidence of guilt is overwhelming. Such acknowledgment can be a sound tactic when the evidence is indeed overwhelming (and there is no reason to suppose that any juror doubts this) and when the count in question is a lesser count, so that there is an advantage to be gained by winning the confidence of the jury."); *Walker v. State*, 194 So. 3d 253, 282 (Ala. Crim. App. 2015) ("Alabama follows the majority view and holds that it is not per se ineffective assistance for an attorney to partially concede a defendant's guilt."); *Taylor v. State*, 696 S.E.2d 686, 691 (Ga. Ct. App. 2010) (holding that it was reasonable to concede guilt to one charge where evidence was overwhelming); *State v. Prtine*, 799 N.W.2d 594, 600 (Minn. 2011) ("Conceding intent to kill is an understandable strategy because it was done in an attempt to build credibility with the jury on the self-defense claim while simultaneously hoping to obtain an acquittal on the top count and a conviction on the least

Clarence Darrow employed strategic concession in a difficult case, asking that his young clients' lives be spared but admitting, "I do not know how much salvage there is in these two boys. . . . I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large." *Nixon*, 543 U.S at 192 (citation omitted).

Indeed, the failure to concede guilt can amount to "mismatched" presentations at the guilt and penalty phases—for example, arguing first that the defendant was not the shooter, then arguing that while he shot the victim, he was mentally unstable. As one capital defense expert explained, "It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney." Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?* 42 MERCER L. REV. 695, 708 (1991). This Court recognized in *Nixon* the problem of taking such an approach, concluding that counsel "must strive at the guilt phase to avoid a counterproductive course" and that "counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'" 543 U.S. at 191–92. Even the ABA Guidelines, though not dispositive as to the standard of effective assistance,

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serious count."); *Pinnell v. Palmateer*, 114 P.3d 515, 529 (Or. 2005) ("A concession of petitioner's involvement in a felony murder reasonably could have been made in order to preserve his credibility with the jury and avoid convictions for aggravated murder, thus avoiding the death penalty. Such a decision strikes us as a reasonable exercise of professional skill and judgment.").

e.g., *Bobby v. Van Hook*, 558 U.S. 4, 8–9 (2009), stress, "Nor will the [penalty-phase] presentation be persuasive unless it (a) is consistent with that made by the defense at the guilt phase and (b) links the evidence offered in mitigation to the specific circumstances of the client." ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 1.1, Commentary (rev. ed. 2003), reprinted in 31 HOFSTRA L. REV. 913, 927 (2003).

Counsel's failure to make a unified guilt- and penalty-phase presentation can give rise to ineffective assistance allegations. For example, in a recent Ohio case, the defendant argued on appeal "that based on the 'overwhelming evidence' of guilt, the only reasonable strategy at trial was to concede guilt rather than pursue a defense that there was reasonable doubt as to who killed the victims." *State v. Sowell*, 71 N.E.3d 1034, 1050 (Ohio 2016). In Texas, a defendant argued that "counsel was deficient in failing to offer a 'unified theory' that applied at both the guilt-determination and the punishment-determination phases of his trial," *Mendoza v. Thaler*, No. 5:09cv86, 2012 WL 12817023, at *2 (E.D. Tex. Sept. 28, 2012), while in Louisiana, a defendant argued that counsel were ineffective for "focusing on blaming the victim and discrediting DNA evidence despite the identity of the criminal never being in dispute." *Hoffman v. Cain*, No. 09-3041, 2012 WL 1088832, at *14 (E.D. La. Mar. 30, 2012). One defendant in North Carolina argued both sides, "claiming that based on [his] confessions and state court guilty plea, his guilt should have been conceded

in an attempt to save him from the death penalty," but that "[b]y the same token, . . . [his] guilt was improperly conceded at trial." *Jackson v. United States*, 638 F. Supp. 2d 514, 599 (W.D.N.C. 2009).

B. Conceding offense elements was a reasonable strategy in this case.

Robert McCoy's case presents a textbook example of a reasonable strategic concession. The evidence against him was damning. Cell phone records placed him in Bossier City, Louisiana, at the time that his estranged wife's mother, stepfather, and son were murdered. The 911 call recorded one victim pleading with "Robert" just before the sound of a gunshot. A white Kia registered to McCoy was seen fleeing the scene, and when an officer gave chase, the driver—a man matching McCoy's description—abandoned the car, scaled a fence, and ran across the Interstate. Officers found the handset of the victims' home telephone in the Kia, as well as ammunition and a Walmart receipt for its purchase earlier that day. Surveillance footage from that Walmart revealed that the purchaser also matched McCoy's description. McCoy was arrested four days later in Lewiston, Idaho, having hitchhiked west in a series of eighteen-wheelers. A silver handgun was found in the cab where he had been riding. *State v. McCoy*, 218 So. 3d 536, 541–44 (La. 2016).

Faced with three counts of first-degree murder and the possibility of the death penalty, McCoy's counsel, Larry English, had few good options. Compounding

the matter, English had little time to prepare, thanks to McCoy's pro se motion for speedy trial; he had difficulty assembling a team because of the short time frame; and he had a client who was, at best, unhelpful. *Id.* at 544–46. McCoy disagreed with English's strategy to have him declared indigent in order to finance a mitigation team. *Id.* at 546. He continued to file detrimental pro se motions. *Id.* When a second defense attorney was appointed to assist English, McCoy "unequivocally declined [his] assistance." *Id.* at 548. Most troubling, however, was McCoy's declaration that he would be offering an alibi. When English informed the court that they had no such alibi evidence, McCoy unsuccessfully attempted to fire him. *Id.*

Months before trial, English concluded that the only reasonable strategic choice was to concede guilt and hope to avoid the death penalty. He even encouraged McCoy to take a guilty plea, should one be offered. *Id.* at 558. English determined that McCoy's supposed alibi was incredible, and presenting an alibi defense would be contrary to his ethical obligations to the court. *Id.* at 564; *see* LA. R. PROF'L CONDUCT 1.2(d). Therefore, he conceded guilt in his opening statement, asking the jury to find McCoy guilty of second-degree murder because of his client's "serious emotional issues." *McCoy*, 218 So. 3d at 549.

English's strategy in this case was objectively reasonable—and it might have been successful, had McCoy not intervened. Refusing to relinquish his claim of an alibi, McCoy took the stand against English's advice, "testif[ying] to his alibi defense and

[seeking] to refute the State's evidence with his theories of a vast conspiracy that landed him on trial for his life." *Id.* at 549. Unsurprisingly, the jury convicted McCoy as charged, and after the penalty phase, they recommended death. *Id.* at 550.

Suppose that English had instead accepted McCoy's strategy and presented his unbelievable alibi defense, insisting to the jury that his client was nowhere near the scene of the murders, despite the cell phone records, surveillance video, 911 recording, and abandoned car. When this strategy inevitably failed, what, then, could English have presented at the penalty phase to secure a sentence less than death? Having lost all credibility with the jury by presenting a ludicrous defense, what could he have done to save his client's life? Arguing that McCoy was not the killer in the guilt phase, then arguing that he was emotionally disturbed at the penalty phase, would not have been a convincing case. When the circumstances of McCoy's trial are considered in toto, English's decision to concede guilt in an effort to build credibility with the jury and save McCoy's life was objectively reasonable. That he did so in contravention of McCoy's wish to pursue a futile alibi defense makes the decision no less so.[2]

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[2] Indeed, under certain conditions, counsel's decision to *honor* a defendant's wishes as to strategy may constitute ineffective assistance. For example, in *Hayes v. State*, 56 So. 3d 72 (Fla. Dist. Ct. App. 2011), the postconviction court was found to have erred in summarily dismissing an ineffective assistance claim where trial counsel, acting on the defendant's wishes, abandoned an insanity defense. The appellate court noted that the defendant had "a significant history of mental illness" and determined that

II. The Court should not create a special rule that applies only when a defendant and his lawyer disagree about conceding the elements of an offense.

The "basic thesis" of this Court's decisions according criminal defendants the right to counsel is that "the help of a lawyer is essential" to a fair trial because the defendant "lacks the skill and knowledge" to identify or present his most effective defense. *Faretta*, 422 U.S. at 832–33 & n.43 (internal citations omitted). In recognition of the "superior ability" of "trained counsel" to evaluate the strengths and weaknesses of a case and to advocate the client's cause, the Court has rejected a per se rule that "the client, not the professional advocate, must be allowed to decide what issues are to be pressed." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Instead, the general rule is that an attorney "has—and must have—full authority to manage the conduct of the trial." *Taylor*, 484 U.S. at 418; *see Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring) ("[Counsel], not the client, has the immediate and ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client.").

The petitioner's proposed rule creates an exception to these general principles for "concessions of guilt."

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even though counsel was respecting his decision, it was unclear whether counsel's decision to abandon the defense was reasonable. *Id.* at 73–74.

But that exception is neither necessary nor advisable. A concession of guilt is no different than any other kind of strategic concession or tactical withdrawal that a lawyer may make over the course of a trial. *Faretta* and *Strickland* already provide a remedy for a defendant who disagrees with his counsel's strategic decisions before trial and afterwards. Moreover, the petitioner's proposed exception presents serious administrability concerns.

A. A concession of guilt by counsel is not the equivalent of a guilty plea.

Although a lawyer usually has the right to make tactical decisions regarding trial strategy, the Court has addressed four "fundamental" areas reserved to the defendant personally: "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones*, 463 U.S. at 751. The petitioner erroneously argues that a lawyer's concession of one or more of the elements of an offense at trial is the equivalent of a guilty plea. This argument is wrong for three reasons.

First, as a practical matter, a concession on an offense element is neither more important nor more dispositive than any other strategic concession or tactical decision that a lawyer might make. A lawyer may decline to move to suppress key evidence, call a witness, press a particular kind of defense, such as self-defense or an alibi, or argue a non-frivolous issue on appeal. *See Taylor*, 484 U.S. at 418 ("Putting to one side the exceptional case in which counsel is

ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial."); *Jones*, 463 U.S. at 753–54 (attorney may reject defendant's request to argue non-frivolous issue on appeal). Presumably, a lawyer may also stipulate to the foundation and admissibility of the government's evidence, removing these burdens from the prosecution. While these decisions may end up being dispositive, they are nonetheless counsel's call.

Courts recognize a lawyer's authority to make these decisions, not because they are insignificant, but because making these kinds of strategic decisions is the job of counsel. The Constitution mandates the provision of counsel because "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law," such that he "lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one." *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963). Although it may be different in degree for a lawyer to concede an element of the charged offense during his opening statement or closing argument, it is no different in kind from strategic decisions that we reasonably expect to be within a lawyer's control.

Second, a guilty plea is not just a formalized concession—it is an absolute waiver of every constitutional right associated with a criminal trial. As this Court has explained, a "plea of guilty is more than a confession which admits that the accused did

various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). A guilty plea thus effects a waiver of several constitutional rights, including the rights to a jury trial and to a determination of guilt by proof beyond a reasonable doubt. *See United States v. Ruiz*, 536 U.S. 622, 628–29 (2002); *Boykin*, 395 U.S. at 242. For those reasons, the decision whether to enter a guilty plea is a personal choice that ultimately resides with the defendant. *See, e.g., Jones*, 463 U.S. at 751; *Brookhart v. Janis*, 384 U.S. 1, 7 (1966).

By contrast, statements by counsel conceding one or more elements of an offense do not effect a waiver of the right to a jury trial or to proof of guilt beyond a reasonable doubt, let alone supersede the need for a trial altogether. The prosecution still must prove the defendant's guilt through competent evidence, and the defendant can seek to exclude evidence that is particularly prejudicial and challenge his conviction on appeal or in postconviction proceedings based on alleged trial errors. *See United States v. Gomes*, 177 F.3d 76, 84 (1st Cir. 1999) ("Counsel's concession was not a guilty plea, which involves conviction without proof, and is therefore properly hedged with protections. Here, the government had to provide a jury with admissible evidence of guilt and did so in abundance."); *Bell v. Evatt*, 72 F.3d 421, 430 (4th Cir. 1995); *Underwood*, 939 F.2d at 474.

Third, even when a lawyer concedes guilt, the defendant stands to gain by having a trial. If the trial is infected by error and the defendant obtains a

mistrial or reversal, then the prosecution may be willing to bargain for a guilty plea rather than retry the case. The concession of guilt may also disrupt the prosecutor's trial strategy or plans for sentencing. Moreover, whenever a criminal case goes to trial, the prosecution must "bear the risk of jury nullification." *Old Chief v. United States*, 519 U.S. 172, 185 (1997). None of these considerations are present when a defendant pleads guilty.

B. *Farretta* and *Strickland* adequately protect a defendant's rights in this unusual circumstance.

A criminal defendant has the fundamental right "to preserve actual control over the case he chooses to present to the jury." *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). That means that under this Court's caselaw, a criminal defendant who disagrees with his lawyer's proposed trial strategy has two options to register that disagreement. Before trial, the defendant may invoke his right to self-representation under *Faretta* and reduce his counsel to a standby role. When the defendant exercises that option, "all conflicts between [the defendant] and counsel [a]re resolved in [the defendant's] favor," such that the defendant's "strategic choices, not counsel's, would prevail." *Id.* at 181. In the alternative, the defendant may wait until after trial and raise ineffective assistance claims under *Strickland*. If counsel's trial strategy was outside the bounds of professionalism compared to the defendant's alternative strategy,

then *Strickland* compels that the defendant receive a new trial with a new lawyer.

The balance struck by *Faretta* and *Strickland* is sufficient when a defendant and his lawyer fundamentally disagree about what kind of investigation to conduct, the kinds of defenses that should be asserted, and whether to call witnesses in the defendant's case-in-chief. *See Taylor v. Illinois*, 484 U.S. 400 (1988). It stands to reason that the rights and remedies provided by these precedents are also sufficient when a defendant and his lawyer disagree about conceding one or more elements of the charged offense. There is no need to create a special category of strategic disagreements—whether to dispute all the elements of a charged offense—and a third way to resolve those disagreements.

The petitioner makes two arguments about the purported inadequacy of *Faretta* and *Strickland*. Neither is persuasive.

First, the petitioner erroneously argues that the *Faretta* right—the right to self-representation with standby counsel—is insufficient because invoking *Faretta* results in a defendant "losing the benefits that skilled counsel brings and to which [the defendant] is entitled." Pet. Br. 30. But this argument ignores the role of standby counsel, who are appointed to "aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Faretta*, 422 U.S. at 834.

In fact, the petitioner's view of the ideal attorney-client relationship is similar to how this Court has described the relationship between a pro se defendant and his standby counsel. The petitioner's main argument is that the Sixth Amendment gives him the personal "right to control the objectives of his defense," Pet. Br. 22, notwithstanding his lawyer's contrary strategic judgment. That is the not the role of trial counsel, but rather that of standby counsel—to "assist the defendant in . . . the defendant's achievement of *his own clearly indicated goals*." *McKaskle*, 465 U.S. at 184 (emphasis added). For example, standby counsel would have been compelled to perform the very functions that the petitioner criticizes his trial counsel for failing to perform: subpoenaing witnesses who had purported "knowledge of the police collusion and his relationship with his estranged wife, as well as an alibi witness who would testify that McCoy was in Houston on the night of the killings." Pet. Br. 15. In short, the petitioner's complaints can and should be resolved by a straightforward application of *Faretta*, not by creating a new and idiosyncratic rule about concessions of guilt.

Second, the petitioner implicitly argues that *Strickland* is an insufficient remedy because a lawyer's strategic decision to concede the elements of an offense constitutes per se ineffective assistance under *United States v. Cronic*, 466 U.S. 648 (1984). Pet. Br. 43. But there is no warrant for concluding that counsel's concession of guilt in order to bolster arguments against a capital sentence amounted to an "entire[] fail[ure] to subject to the prosecution's case

to meaningful adversarial testing." *Cronic*, 466 U.S. at 659; *see Bell v. Cone*, 535 U.S. 685, 696–97 (2002) ("When we spoke in Cronic of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete," rather than a "fail[ure] to do so at specific points."). As explained above, the penalty phase of a capital trial "is in many respects a continuation of the trial on guilt or innocence of capital murder," *Monge v. California*, 524 U.S. 721, 732 (1998), and assessing the effect of representation must take into account the unique focus of the case on the possible imposition of the death sentence. A reasoned strategic judgment by counsel to concede guilt in order to bolster arguments against a capital sentence is the opposite of a complete failure to "subject the prosecution's case to meaningful adversarial testing." *Cronic*, 466 U.S. at 659. It is instead a calculated strategic decision to test the prosecution's case in a particular way—by enhancing the defendant's prospects at sentencing.

This Court has never suggested that reasoned, tactical judgments of the sort at issue here could trigger *Cronic*'s per se presumption of prejudice. The purpose of that presumption is to address situations in which "the adversary process [is] itself presumptively unreliable." *Id.* There could be no basis for concluding that a conviction is "presumptively unreliable" when the decision to acknowledge guilt derives from a considered assessment by counsel that the evidence against the defendant is overwhelming. Insofar as counsel's assessment in that regard may be unreasonable in a particular case, it likely would

result in a finding of prejudice under *Strickland*, but there is no warrant for applying *Cronic*'s across-the-board presumption. *See Smith v. Robbins*, 528 U.S. 259, 286–87 (2000) (concluding that *Cronic* presumption of prejudice is inapplicable to claim that counsel was ineffective in concluding that there were no meritorious arguments to be raised on appeal, because there is no reason to presume that counsel's assessment was erroneous).

C. Petitioner's proposed rule is not administrable.

The exception that petitioner asks this Court to create will be difficult to apply in three ways.

First, it will inject substantial uncertainty into every *Faretta* hearing. *Faretta* requires a trial court to hold a hearing to determine whether a defendant has voluntarily and reasonably decided to represent himself. *E.g.*, *Indiana v. Edwards*, 554 U.S. 164, 182 (2008). If petitioner's rule is adopted, then when a defendant claims the right to represent himself because he has a fundamental disagreement with his lawyer, the trial judge will need to evaluate whether his case is one of those unique cases in which the defendant may compel his lawyer to adopt a specific trial strategy, instead of reducing his lawyer to standby counsel.

This, then, raises a separate inquiry: *can* a court compel counsel to adopt the defendant's strategy when doing so would cause counsel to violate his ethical obligations? In Louisiana, for example, Rule

1.2(a) of the Rules of Professional Conduct states that a lawyer "shall abide by a client's decisions concerning the objectives of representation" and "shall consult with the client as to the means by which they are to be pursued," but Rule 1.2(d) cautions that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Indeed, Rule 3.3(a) stresses that a lawyer "shall not knowingly . . . make a false statement of fact or law to a tribunal" or "offer evidence that the lawyer knows to be false," either directly or through a witness—including his client. In the present matter, petitioner wished to proceed with his alibi case—a strategy English could not pursue in good faith and in accordance with his ethical obligations. If petitioner's rule were to be adopted, could a court then order counsel to violate the rules of professional conduct if a defendant insisted on pursuing a false, facially incredible defense like petitioner's?

Second, it will be difficult in the mine run of cases to determine whether a defendant has sufficiently "objected" to his lawyer's concession of guilt to invoke petitioner's new rule. As the petitioner rightly concedes, the *Nixon* Court addressed a similar issue and held that a lawyer may concede guilt without his client's express consent. The only difference between *Nixon* and this case is the degree to which the defendant responded when his counsel unveiled his trial strategy: while the defendant in *Nixon* was "unresponsive," 543 U.S. at 192, petitioner was adamantly against his lawyer's strategy. But this clarity in a client's wishes is unusual.

There is a wide range between unresponsive and adamant, with plenty of room for misunderstandings, 20/20 hindsight, and belated instructions to change an agreed-upon strategy. A strategy that looked promising before the prosecution's opening statement may look less promising afterwards. When does a client irrevocably commit to the concession strategy? How long does he reserve the right to change his mind? The only way to ensure that a defendant knowing and voluntarily agrees to a strategy would be to put the issue on the record like a guilty-plea colloquy. When such a colloquy would occur in the course of the trial or how it could be done without disclosing the defense strategy itself is entirely unclear.

Third, even when it might be possible to determine that a client expressly communicated his lack of consent to a strategy, it would be difficult to determine whether the lawyer actually made a strategic decision that "concedes" guilt. Statements by counsel allegedly amounting to concessions of guilt can come in a variety of forms, and it is unclear precisely what set of words—and what degree of concession—might trigger the defendant's right to object to counsel's strategy. The implications of counsel's statements might vary not only depending on the specific choice of words, but also depending on when they occur in the course of the proceedings.

These considerations militate against adopting a per se rule about a lawyer's concession of an offense's elements over a defendant's objection. Such bright-line rules fail to "take account of the variety of

circumstances faced by defense counsel" and can detract "from the overriding mission of vigorous advocacy of the defendant's cause." *Strickland*, 466 U.S. at 688–89. Rather than establishing such "detailed guidelines for representation" depending on what words are used and when they are stated, *Strickland*, 466 U.S. at 689, the proper course is to "judge the reasonableness of counsel's challenged conduct on the facts of the particular case," *id.* at 690. Given the availability of this kind of nuanced review under *Strickland*, there is little to gained and much to be lost from adopting a bright-line rule here.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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No. 16-8255

IN THE

Supreme Court of the United States

ROBERT MCCOY,

Petitioner,

v.

LOUISIANA,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether it is unconstitutional for defense counsel to admit an accused's guilt over the accused's express objection.

INTEREST OF AMICUS CURIAE[1]

The American Bar Association ("ABA") is the leading voluntary organization of legal professionals in the United States. The ABA's membership comprises more than 400,000 members from all fifty states and U.S. territories, and includes prosecutors, public defenders, and private defense counsel, as well as attorneys in law firms, corporations, nonprofit organizations, and government agencies. ABA members also include judges, legislators, law professors, and law students.

An important component of the ABA's mission is to advocate for the ethical and effective representation of all clients, and promote the fair and effective administration of justice. *See* ABA CONST. ART. 1, § 1.2. The ABA is a leading expert on legal ethics and the standards of practicing law, including criminal and capital defense. And while the ABA takes no position on the constitutionality of the death penalty *per se*, the ABA considers a defendant's Sixth Amendment right to defend himself and to the assistance of counsel to be of exceptional importance in capital cases.

The ABA has promulgated standards and guidelines for the effective representation of criminal defendants, including in capital cases. The ABA's role

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[1] Pursuant to Supreme Court Rule 37.3(a), the ABA certifies that all parties have consented to the filing of this brief. Pursuant to Rule 37.6, the ABA certifies that no counsel for a party authored this brief in whole or in part, and no persons other than the ABA or its counsel made a monetary contribution to its preparation or submission.

in developing such standards dates back to the 1908 Canons of Professional Ethics, and includes the 1983 publication of the Model Rules of Professional Conduct, which form the basis for rules governing the professional conduct of lawyers in almost every state. The ABA's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("Guidelines"), first adopted as ABA policy in 1989 and revised in 2003, establish a baseline for effective representation at all stages of a capital case. The Guidelines have been widely adopted by state and local bar associations, indigent defense organizations, and by court rule in many jurisdictions.

This case addresses the core of the Sixth Amendment and of the attorney-client relationship—namely, a client's right to decide whether to concede guilt or to defend against the charges against him or her, and the proper role of an attorney once the client has expressly made that decision and conveyed it to counsel. With respect to those issues, the ABA's long history of developing, refining, and advocating for national standards governing the attorney-client relationship informs a perspective that may be of benefit to the Court.

SUMMARY OF ARGUMENT

This case involves a foundational principle of the attorney-client relationship: an attorney serves the interests of his or her client, and must respect the client's right to make fundamental decisions regarding the litigation of his or her case. There is no decision more fundamental in a criminal case than the decision whether to admit or contest guilt. And

while the deference an attorney owes to a client's strategic litigation decisions has important limits, the decision at issue in this case resides at the core, not the outer edges, of the classes of client decisions that counsel lacks discretion to overrule.

The decision of the Louisiana Supreme Court is contrary to firmly entrenched constitutional norms that undergird the policy guidance promulgated by both the ABA and the Louisiana State Bar Association. A mentally competent client has the right to decide whether to contest or admit guilt.[2] Mr. English's usurpation of Mr. McCoy's clearly-expressed decision to contest guilt at trial, however well intended, violated the principles underlying the proper role of counsel in an attorney-client relationship as laid out in the Constitution and the rules, guidelines, and standards of the ABA and the Louisiana State Bar Association.

ARGUMENT

This case presents the question whether defense counsel may unilaterally override the client's explicit direction to seek an acquittal by contesting guilt, and instead pursue the opposite strategy of admitting guilt at trial in the hope of leniency. Under the Sixth Amendment—as well as under longstanding policies of the ABA and the Louisiana State Bar Association—the answer to that question is no.

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[2] "At a hearing held on November 14, 2008[,] the trial court noted that [two] experts [had] found [Mr. McCoy] competent to stand trial." JA38.

This case arises from the 2011 trial of Petitioner Robert McCoy for the murders of his estranged wife's son, mother, and step-father. A month prior to trial, Mr. McCoy's counsel, Larry English, told him that the case could not be won and that Mr. McCoy's best strategy would be to plead guilty, but Mr. McCoy rejected that advice. Two weeks before the trial date, Mr. English informed his client that, despite Mr. McCoy's stated intentions regarding his case, and his *pro se* alibi notice, Mr. English would not offer any alibi evidence, and would be conceding Mr. McCoy's guilt in an effort to save his life. Mr. McCoy expressly opposed this strategy and informed both counsel and the trial court of his opposition. He sought new trial counsel or to represent himself, but the trial court denied his request as untimely.

At trial, Mr. McCoy attempted to advance his innocence claim, but was ignored and contradicted by his lawyer from the outset of the trial to its end. Even after Mr. McCoy testified that he was innocent, and explained that he was out of state and therefore could not have committed the crimes, Mr. English told the jury that Mr. McCoy had committed the murders, that the prosecution had been relieved of its burden of proof, and that there was no alibi defense. A unanimous jury convicted Mr. McCoy of all three counts of first degree murder. The Louisiana Supreme Court denied the appeal and affirmed the three convictions and death sentences.

Amicus respectfully urges this Court to hold, consistent with longstanding Sixth Amendment

principles and with rules and guidelines of the ABA, that a lawyer may not confess his client's guilt to the jury over the client's express objection. ABA rules, standards, and guidelines as well as state law counterparts[3] provide guidance on the appropriate role of attorneys in assisting their clients. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Here, Mr. English's unilateral decision to overrule his client's stated objective of contesting guilt violated rules of the ABA and the Louisiana State Bar Association governing attorney-client relationships, as well as the constitutional rights that inform those rules.

I. THE SIXTH AMENDMENT GRANTS THE CLIENT THE RIGHT TO CONTROL THE FUNDAMENTAL OBJECTIVES OF HIS OR HER DEFENSE

ABA policies governing the allocation of authority in an attorney-client relationship are based on and implement the constitutional guarantees of the accused. One such principle is the notion that the attorney is an assistant to the client. *Faretta v. California*, 422 U.S. 806, 820 (1975) (noting that the Sixth Amendment "speaks of the 'assistance' of

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[3] The Louisiana Rules of Professional Conduct are largely modeled after the ABA Model Rules of Professional Conduct. *See* AMERICAN BAR ASSOCIATION, *State Adoption of the ABA Model Rules of Professional Conduct*, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited November 20, 2017) (Louisiana first adopted the ABA's Model Rules of Professional Conduct in 1986).

counsel, and an assistant, however expert, is still an assistant"). The attorney, as an assistant, is obliged to respect the client's autonomy to make fundamental decisions about his or her case. As this Court has explained, the Sixth Amendment "grants to the accused personally the right to make his defense," because it is the defendant "who suffers the consequences if the defense fails." *Id.* at 819-20. "Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense." *Id.* at 821.

The principle that fundamental decisions are committed to the client—such as the decisions whether to plead guilty, to testify, or to appeal—appropriately respects the client's ultimate right to control the core objectives of his or her defense. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979) ("As part of th[e] right to make a defense, the [Sixth] Amendment speaks of the 'assistance' of counsel, thus contemplating a norm in which the accused, and not a lawyer, is master of his own defense.") (citing *Faretta*, 422 U.S. at 819-20).

As this Court explained in *Strickland v. Washington*, 466 U.S. 668 (1984), an attorney's role as "assistant to the defendant" creates "the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Ibid.* at 688. Prior to *Strickland*, this Court explained that "fundamental" decisions in a case include "whether to plead

guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (citing ABA STANDARDS FOR CRIMINAL JUSTICE §§ 4-5.2, 21-2.2 (2d ed. 1980)). For such decisions, this Court has "recognized that the accused has the ultimate authority." *Id.*; *see also Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, J., concurring) ("[S]uch basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make.") (citing ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 5.2 (App. Draft 1971)).

The decision whether to confess guilt at trial—like the decision whether to plead guilty at the outset of a case and the decision to testify—is a fundamental decision that implicates a defendant's Fifth Amendment privilege against self-incrimination. *See State v. Carter*, 14 P.3d 1138, 1148 (Kan. 2000) (holding that a refusal to present defendant's innocence defense, and conceding the defendant's involvement, betrayed "the defendant by deliberately overriding his plea of not guilty"). Indeed, a defendant's right to contest guilt at the pleading stage means little if counsel is permitted to undermine the defendant's wishes with repeated public statements about the defendant's guilt during trial. Timing should not determine whether a client who has exercised the fundamental right to refuse to admit guilt in a criminal case may be overruled by his or her counsel.

Florida v. Nixon, 543 U.S. 175 (2004), is fully consistent with the proposition that counsel may

not override a client's express decision to contest guilt. Defense counsel in *Nixon* "attempted to explain . . . [his proposed concession] strategy to Nixon at least three times," but, unlike Mr. McCoy in this case, "Nixon was generally unresponsive during their discussions. He never verbally approved or *protested* [his counsel's] proposed strategy." *Nixon*, 543 U.S. at 181 (emphasis added) (citations omitted). The Court held that "when a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course." *Id.* at 178.

Here, in contrast to *Nixon*, Mr. McCoy was fully engaged with his defense, and unequivocally expressed his opposition to Mr. English's strategy of conceding guilt. Mr. McCoy's testimony on his own behalf at trial makes clear that his consistent objective was to maintain his innocence and seek an acquittal. The trial court nonetheless required Mr. McCoy to proceed to trial with an attorney intent on admitting his guilt. Mr. English's conduct—including undermining Mr. McCoy's alibi both before and after he testified—overrode Mr. McCoy's objective, violating his right to control the basic goals of his own defense.

Mr. McCoy expressly objected to the implementation of a concession strategy, and the lower courts have recognized that *Nixon* is inapposite under such circumstances. *See People v. Bergerud*, 223 P.3d 686, 693, 699 n.11 (Colo. 2010) (en banc) (distinguishing *Nixon* where "attorneys had effectively

conceded [the client's] guilt to lesser homicide offenses despite [the client's] desire to defend against the charges and seek acquittal" on grounds that "the defendant *explicitly* objected to counsel's actions on his behalf") (emphasis in original); *Cooke v. State*, 977 A.2d 803, 847 (Del. 2009) ("[W]here, as here, the defendant *adamantly objects* to counsel's proposed objective to concede guilt and pursue a verdict of guilty but mentally ill, and counsel proceeds with that objective anyway, the defendant is effectively deprived of his constitutional right to decide personally whether to plead guilty to the prosecution's case, to testify in his own defense, and to have a trial by an impartial jury. The right to make these decisions is nullified if counsel can override them against the defendant's wishes.") (emphasis in original).

The ABA guidelines on which the *Nixon* Court relied offer no support for the decision below. The *Nixon* Court, for example, cited commentary to ABA Guideline for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, which explains that in capital cases where "the evidence is overwhelming and the crime heinous . . . 'avoiding execution [may be] the best and only realistic result possible.'" *Nixon*, 543 U.S. at 191 (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES § 10.9.1 CMT (rev. ed. 2003) [hereinafter GUIDELINES]). While it may be true that conceding guilt in the hope of avoiding death is a reasonable strategic decision in some cases, the decision remains the client's to make. Neither the Sixth Amendment nor the ABA's Guidelines au-

thorize counsel to force an admission of guilt upon an objecting client simply because counsel believes it is good litigation strategy. *See* GUIDELINES § 10.9.1(f) ("Counsel should not accept any agreed-upon disposition without the client's express authorization."). Because Mr. McCoy expressly exercised his right to reject Mr. English's proposed concession strategy, *Nixon* is not controlling.

II. ABA AND LOUISIANA STATE BAR ASSOCIATION GUIDELINES PROTECT THE CLIENT'S SIXTH AMENDMENT RIGHT TO DECIDE WHETHER TO ADMIT OR CONTEST GUILT

A. ABA and Louisiana State Bar Association Ethical Rules Confirm the Constitutional Guarantee That Clients Control the Fundamental Objectives of Their Representation

The ABA rules, standards, and guidelines relevant to this case closely track the constitutional principle that the client has the ultimate say over the objectives of his or her defense, and accordingly, advise that the decision whether to concede or contest guilt belongs to the client. Specifically, ABA Model Rule of Professional Conduct 1.2 ("Rule 1.2") and its Louisiana counterpart, Louisiana Rule of Professional Conduct 1.2, govern the scope of representation and the allocation of authority between a client and his or her counsel. Rule 1.2 clearly establishes that a lawyer's role is to execute the client's objectives and dictates that a lawyer "abide by a client's decisions concerning the objectives of representation"—in the case of Mr. McCoy, to seek an

acquittal—and "consult with the client as to the means by which they are to be pursued." MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2014); *see* LA. RULES OF PROF'L CONDUCT r. 1.2(a) (2017). Rule 1.2 and its accompanying commentary are well established and embody longstanding policies that have been universally embraced by the legal community.

Certain basic decisions are left to clients and may not be overruled by defense counsel, including the fundamental decision whether to plead guilty. "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." MODEL RULES OF PROF'L CONDUCT r. 1.2(a); *see* ABA CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTIONS § 4-5.2(b)(ii) (4th ed. 20015) [hereinafter STANDARDS] ("The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include[s]: what pleas to enter . . . ."); GUIDELINES § 10.5(c) CMT. ("Some decisions require the client's knowledge and agreement."). "A lawyer's duty under Rule 1.2(a) to defer to certain client decisions in a criminal matter is a necessary corollary of a criminal defendant's constitutional right to make decisions regarding matters that are 'fundamental' or 'substantive' because they derive from constitutional guarantees." ELLEN J. BENNETT ET AL., ANN. MODEL RULES OF PROF'L CONDUCT § 1.2 (8th ed. 2015) (collecting cases).

Although a decision to admit guilt at trial—unlike the decision to plead guilty, *see Nixon*, 543

U.S. at 188—may not always require the client's express prior consent, a lawyer cannot force the client to adopt such a strategy over his or her objection. Where a client expressly objects to conceding guilt, the decision to admit guilt is akin to pleading guilty in its "material impact on the case." GUIDELINES § 10.5(c); *see Carter*, 14 P.3d at 1148. Such an admission takes away the client's constitutional right to decide for himself whether to defend against the charges. It compromises both the client's right to testify and the corresponding right to remain silent. Admitting guilt at trial over the client's express objection is no different from forcing the client to plead guilty at the case's outset under the Constitution and ABA policies.

The contrary rule adopted by the Louisiana Supreme Court undermines the attorney-client relationship. As the ABA guidance recognizes, an attorney has a practical need to maintain the client's trust, as well as an obligation to advance the client's lawful objectives. "In the initial meeting with a client, defense counsel should begin the process of establishing an effective attorney-client relationship. This includes assuring the client of confidentiality, establishing trust, explaining the posture of the matter, discussing fees if applicable, *and inquiring about the client's objectives for the representation*." STANDARDS § 4-3.3(a) (emphasis added); *see also id.* § 4-3.1(b) ("At an early stage, counsel should discuss with the client objectives of the representation . . . ."); GUIDELINES § 10.5(a) ("Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client . . . ."). In capital cases, the

ABA advises that "[c]ounsel at all stages . . . engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as . . . the development of a defense theory; . . . presentation of the defense case; [and] . . . potential agreed-upon dispositions of the case." GUIDELINES § 10.5(c). While "[c]ertain decisions relating to the conduct of the case are for the accused[, and] others are for defense counsel, . . . counsel should give great weight to strongly held views of a competent client . . . ." STANDARDS § 4-5.2(a).

Here, two weeks before trial, well past "an early stage" in the case as prescribed by ABA Criminal Justice Standard for the Defense Functions § 4-3.1(b), Mr. English announced to his client his intention to "concede that [Mr. McCoy] had killed the three victims." JA286. Not only did Mr. English fail to "give great weight to [Mr. McCoy's] strongly held views," STANDARDS § 4-5.2(a), he disregarded Mr. McCoy's ultimate choice to maintain his innocence. Instead, Mr. English pursued his own personal strategy for "sav[ing Mr. McCoy's] life." JA286. And the day two weeks before trial that Mr. McCoy learned about Mr. English's concession strategy was, as Mr. English himself admitted, "essentially the end of [the] professional relationship." *Id.*

The Constitution, Rule 1.2 and its Louisiana counterpart clearly required Mr. English to "abide by [Mr. McCoy's] decisions concerning the objectives of representation," and "consult with [Mr. McCoy] as to the means by which they [we]re to be

pursued." MODEL RULES OF PROF'L CONDUCT r. 1.2(a); *see* LA. RULES OF PROF'L CONDUCT r. 1.2(a). "A lawyer who fails to carry out the objectives of a representation chosen by the client violates Rule 1.2." BENNETT ET AL., ANN. MODEL RULES OF PROF'L CONDUCT § 1.2 (collecting cases); *see, e.g., Taylor v. State*, 28 A.3d 399, 408 (Del. 2011) ("[A]n irreconcilable conflict existed between [the defendant's] desired result, a not guilty verdict, and his counsel's proposed strategy of raising the defense of guilty but mentally ill [("GBMI")] at trial. . . . [T]he trial judge denied . . . [defense counsel] the opportunity to present GBMI to the jury . . . . This ruling protected [the defendant's] individual right to determine whether or not to present a defense of GBMI to the jury . . . .") (internal quotation marks and alteration omitted).

The principle that the client must be permitted to make fundamental decisions relating to whether to admit or contest guilt is consistent with the substantial discretion that attorneys have to determine trial tactics and strategy. The ABA has long maintained that "[d]ecisions that involve tactics and trial strategy may constitutionally be made by the lawyer after consultation with the client." BENNETT ET AL., ANN. MODEL RULES OF PROF'L CONDUCT § 1.2; *see* STANDARDS § 4-5.2(d) ("Strategic and tactical decisions should be made by defense counsel, after consultation with the client where feasible and appropriate. Such decisions include how to pursue plea negotiations, how to craft and respond to motions and, at hearing or trial, what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what

motions and objections should be made, what stipulations if any to agree to, and what and how evidence should be introduced."). Consultation, while not mandatory for every decision relating to investigation or trial strategy, ensures that the attorney's assistance remains in line with the client's objectives for his or her defense. What counsel may not do, under the Sixth Amendment or ethical rules, is overrule the client's express decision to maintain innocence or admit guilt.

Finally, the trial court compounded Mr. English's failure to pursue Mr. McCoy's ultimate goal with decisions that increased the likelihood that Mr. McCoy's objectives would be bypassed. Specifically, the trial court denied Mr. McCoy's request for new counsel as untimely and allowed Mr. English to advance a concession strategy, despite having notice of Mr. McCoy's repeated and strenuous objections. *See* JA460-JA461; JA505-JA506.

B. Respecting Client Control Over Fundamental Decisions Is Consistent With the Ethical Duty of Candor to the Tribunal

The Louisiana Supreme Court erred in its conclusion that Mr. English's conduct was necessary to avoid violating the duty of candor toward the tribunal by eliciting false or perjured testimony. *See* JA208. That duty, which is enshrined in ABA Model Rule of Professional Conduct 3.3 and its Louisiana counterpart, Louisiana Rule of Professional Conduct 3.3, is not at issue here. "The prohibition against offering false evidence only applies if the lawyer *knows* that the evidence is false. A lawyer's

reasonable belief that evidence is false does not preclude its presentation to the trier of fact." MODEL RULES OF PROF'L CONDUCT r. 3.3 CMT. 8 (emphasis added); *see id.* CMT. 9 ("Because of the special protections historically provided criminal defendants . . . Rule [3.3] does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.").

Although his post-trial declaration claimed that he was "convinced that the evidence against Robert McCoy was overwhelming," JA286, there is no evidence that Mr. English *knew* Mr. McCoy's testimony (or the other evidence he sought to offer) was false. In fact, Mr. English noted that "[t]hroughout the entire period of [his] representation, Mr. McCoy adamantly maintained his innocence and claimed that he was out of state at the time of the killings." JA284-JA285. Even a good faith disagreement with such an innocence strategy does not implicate the duty of candor to the tribunal. Respecting a client's stated refusal to admit guilt is not akin to *knowingly* offering false testimony to a court, and only the latter is prohibited.

To be sure, "the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *United States* v. *Cronic*, 466 U.S. 648, 656 n.19 (1984). That said, where a criminal defendant

wishes to maintain his or her innocence during trial, defense counsel is obliged, at minimum, to hold the prosecution to the burden of proving guilt beyond a reasonable doubt. *See id.* ("[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt."). Defense counsel may hold the prosecution to its burden by undermining the prosecution's case through various means, including rigorous cross-examination. Such a strategy effectuates the client's stated goal of contesting guilt but does not entail violating the duty of candor to the tribunal.

Had Mr. English been presented with proposed testimony that he knew to be false, which did not happen here, he would have had other means with which to address that concern short of conceding his client's guilt. For example, an attorney has the option to seek withdrawal from the case. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3 CMT. 15. Further, an attorney can refuse to participate in the presentation of affirmative evidence that the attorney knows to be false during the defense case. *See id.* CMT. 5 (Rule 3.3(a)(3) "requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes"). Under no circumstances is a lawyer ethically required, or allowed, to overrule the client's decision to defend the charges and tell the jury the client is guilty.

* * *

Longstanding ABA guidance rooted in the Sixth Amendment clearly provides that the client, not

counsel, must be permitted to decide the core objectives of a case. Accordingly, fundamental decisions such as whether to contest or concede guilt must be left for the client to make. To require a client to concede guilt, notwithstanding his or her clear objection, is at odds both with the Constitution as well as the relevant ABA rules, standards, and guidelines that implement basic constitutional principles governing the right to defend oneself and to the assistance of counsel.

CONCLUSION

The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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No. 16-8255

In the Supreme Court of the United States

Robert McCoy,

Petitioner,

v.

State of Louisiana,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a State may constitutionally hale a person into its criminal courts and there force an admission of guilt upon him, even when he insists upon his innocence.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999, and focuses in particular on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

Cato's concern in this case is defending and securing the principle of defendant autonomy, and ensuring that the criminal defense bar functions as a check on government power through zealous representation of individual citizens—not as an arm of the state imposing its own view of the good on unwilling defendants.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

SUMMARY OF ARGUMENT

Criminal defense is personal business. A criminal defendant may never face a more momentous occasion than his trial, nor one where his decisions have greater personal consequence. This Court has therefore recognized that the Constitution not only mandates procedural rights for the accused, but also secures a defendant's autonomy in the exercise of those rights: "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." *Faretta v. California*, 422 U.S. 806, 819 (1975). This principle of autonomy has received the most judicial attention in the context of self-representation, but also finds expression in the defendant's right to choice of counsel, *see United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), and in a defendant's "ultimate authority to make certain fundamental decisions regarding the case," *Jones v. Barnes*, 463 U.S. 745, 751 (1983), even when represented by counsel.

In the present case, Robert McCoy sought to exercise his autonomy on one of the most fundamental decisions a defendant can possibly make—whether to admit or deny his own guilt before a jury. On trial for his life, McCoy made an informed, intelligent, and timely decision to maintain his innocence and put the state to its burden. But that decision was not respected. Over McCoy's express objection, the trial court permitted his attorney, Larry English, to tell the jury that McCoy was guilty of murder. With the court's approval, English even purported to relieve the state of its burden to prove McCoy guilty of murder beyond a reasonable doubt. *See* JA649 ("I took that burden off of [the prosecutor]. I took that burden off of you."). Following this

brazen violation of McCoy's autonomy, the jury returned a unanimous verdict for first degree murder, and sentenced McCoy to death.

The Louisiana Supreme Court upheld McCoy's conviction, and effectively treated his insistence on deciding for himself whether to admit or deny guilt as a claim for ineffective assistance of counsel. But that framing elides the fundamental interest at issue in this case. No one disputes that, in a capital case with overwhelming evidence, it may be tactically advantageous to admit guilt, with the hope of avoiding the death penalty at the sentencing phase. Indeed, *Florida v. Nixon*, 543 U.S. 175, 178 (2004) expressly holds that such a strategy is not inherently deficient under *Strickland v. Washington*, 466 U.S. 668 (1984). But the issue here is not whether such a strategy is reasonable; it is whether a mentally competent defendant, fully informed of his situation, may decide for himself whether to maintain his innocence and demand the state prove his guilt beyond a reasonable doubt.

To be sure, if a defendant has decided to be represented by counsel, his attorney may have the power "to make binding decisions of trial strategy in many areas." *Faretta*, 422 U.S. at 820. But admitting guilt over a client's express objection is much more than a mere strategic decision; it strikes at the very purpose of a jury trial—the adjudication of guilt—and eviscerates the defendant's prerogative to decide upon the objectives of representation by counsel. A criminal justice system built upon the presumption of innocence, with ample procedural protections for the accused to put the state to its burden, becomes a process in which an admission of guilt is forced upon a presumptively innocent defendant without his consent.

Protecting defendants against unwanted admissions of guilt is fully consistent with the Court's decision in *Florida v. Nixon*. That case involved the distinct situation where "a defendant, informed by counsel, *neither consents nor objects* to the course counsel describes as the most promising means to avert a sentence of death." 543 U.S. at 178 (emphasis added). In that scenario—where the defendant is consulted, but chooses *not* to exercise his autonomy—counsel may pursue the course he deems wisest without obtaining the client's express consent. *Id.* That ruling clearly leaves open the possibility of a different outcome when a defendant expressly objects to any admission of guilt. Indeed, *Nixon*'s repeated affirmation of counsel's "duty to discuss potential strategies with the defendant," *id.*, necessarily presumes that the defendant's agency is of prime relevance to this subject.

Beyond the defendant's personal interest, failure to respect defendant autonomy damages the criminal justice system as a whole. Affirming the opinion below would endorse the gross spectacle of a divided defense—where, as here, the defendant interrupts and objects to his own lawyer's presentation, and is impeached by his own counsel under cross-examination. Such a presentation to the jury threatens the adversarial system itself, and undermines public confidence in the fair administration of justice. Adopting the government's position would also put defense counsel in impossible ethical dilemmas and encourage more defendants to proceed *pro se*, even if they otherwise would have welcomed the assistance of counsel. The defendant, his lawyer, and the system as a whole will all be best served by a clear decision protecting the defendant's autonomy.

ARGUMENT

I. THE CONSTITUTION PROTECTS THE AUTONOMY OF CRIMINAL DEFENDANTS.

A. Defendants have the right to make fundamental decisions about their defense and decide upon the purpose of representation by counsel.

This Court has usually not resolved criminal cases on the basis of autonomy *per se*, but it is a principle that underlies decisions across a wide range of contexts—most notably, self-representation, choice of counsel, and the defendant's authority to make fundamental decisions in his case, even when represented by counsel. Taken as a whole, this jurisprudence establishes that autonomy is a bedrock principle of the Sixth Amendment, and due process more generally.

1. Defendant autonomy received robust consideration in *Faretta v. California*, 422 U.S. 806 (1975), and in the Court's subsequent self-representation cases. But in holding that a defendant has the right to represent himself, the Court relied on the larger and more fundamental right "to make one's own defense personally," *id.* at 819, of which self-representation is only one component.

The holding in *Faretta* was not just an interpretation of the Assistance of Counsel Clause, nor a mere inference from the general capacity of defendants to waive constitutional rights. *See* 422 U.S. at 819 n.15 ("Our concern is with an independent right of self-representation. We do not suggest that this right arises mechanically from a defendant's power to waive the right to the assistance of counsel.").

Instead, self-representation was "necessarily implied by the structure of the [Sixth] Amendment," and an instance of those constitutional rights that "though not literally expressed in the document, are essential to due process of law in a fair adversarial process." *Id.* at 819 & n.15.[2] The Court emphasized that *all* of the procedural rights in the Sixth Amendment, not just the assistance of counsel, are "grant[ed] to the accused personally, *id.* at 819, and that this suite of "defense tools" must be protected as an "aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally," *id.* at 820. The Sixth Amendment's guarantee that "the accused personally" possesses "the right to make his defense," *id.* at 819, is essentially stating the principle of defendant autonomy.

The extensive legal history of the right to self-representation discussed in *Faretta* underscores the historical basis for defendant autonomy more generally. *See id.* at 821-32. Self-representation is, in some sense, the ultimate expression of autonomy, as it necessarily includes the right to conduct the entirety of one's own defense personally. And many of the Colonial Era sources relied upon by the Court explicitly grounded this right in the natural liberty of all free persons. *See id.* at 828 n.37 (Pennsylvania Frame of Government of 1682 provided that "in all courts all persons of all persuasions may freely appear in their own way"); *id.* at 829 n.38 (Georgia Constitution in 1777 secured "that inherent privilege of every freeman, the liberty to

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[2] The Court gave as examples a defendant's right "to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, to testify on his own behalf, and to be convicted only if his guilt is proved beyond a reasonable doubt." *Faretta v. California*, 422 U.S. 806, 819 n.15 (citations omitted).

plead his own cause"); *id.* at 830 n.39 (Thomas Paine, in support of the 1776 Pennsylvania Declaration of Rights, argued that people "a natural right to plead [their] own case").

The subsequent self-representation case law reinforces this autonomy-driven understanding of *Faretta*. *McKaskle v. Wiggins* explicitly confirms that "the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy." 465 U.S. 168, 178 (1984). *See also Indiana v. Edwards*, 554 U.S. 164, 176 (2008) ("'[d]ignity' and 'autonomy' of individual underlie self-representation right"). In *Rock v. Arkansas*, the Court held that "an accused's right to present his own version of events in his own words" was "[e]ven more fundamental to a *personal defense* than the right of self-representation." 483 U.S. 44, 52 (1987) (emphasis added). In other words, the right to a "personal defense"—the defendant's autonomy—is the fountainhead from which flow specific procedural guarantees. And in *Weaver v. Massachusetts*, the Court explained that the right to self-representation "is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." 137 S. Ct. 1899, 1908 (2017).

Even where the Court has identified the limits of the right to self-representation, it has generally done so in a manner that tracks the limits of autonomy itself. *See, e.g., Edwards*, 554 U.S. at 176-77 (dignity and autonomy interests are not served when defendant lacks the mental capacity to conduct his defense in the first place);[3] *McKaskle*, 465 U.S. at 185 (limited participation of standby counsel at trial did not violate right

[3] It could reasonably be argued that an autonomy-driven understanding of self-representation mandates a different outcome

to self-representation when the *pro se* defendant maintained "actual control of the defense").

Even in *Martinez v. Court of Appeal of California*, which held that the right to self-representation did not apply on appeal, 528 U.S. 152, 160 (2000), the Court acknowledged that "the right to self-representation at trial was grounded in part in a respect for individual autonomy," *id.* Although "autonomy," in the abstract, is "also applicable to an appellant seeking to manage his own case," the foundational notion of *defendant* autonomy implicit in the Sixth Amendment is the right to conduct one's own defense "in preparation for trial and at the trial itself." *Id.* Because the Sixth Amendment does not guarantee a right to an appeal at all, the same concerns do not apply in the appellate context. *See id.* at 160-61.

2. Just as a defendant's autonomy guarantees the right to self-representation, it also supports the right to retained counsel of one's *choice. United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006). The Assistance of Counsel Clause does not discuss "choice of counsel" in so many words, but the "right to select

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than the one reached in *Indiana v. Edwards*, and that mentally ill defendants—when competent to stand trial—should be permitted to elect self-representation. *See* 554 U.S. 164, 187 (2008) ("[I]f the Court is to honor the particular conception of 'dignity' that underlies the self-representation right, it should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made.") (Scalia, J., dissenting). But regardless of whether *Edwards* was rightly decided, both the majority and the dissent agreed on autonomy as the foundational principle; they simply disagreed on its application in the area of mental illness. *See generally* Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. Rev. 1147, 1184-87 (2010) (discussing the complicated relationship between mental illness and defendant autonomy).

counsel of one's choice . . . has been regarded as the root meaning of the constitutional guarantee." *Id.* at 147-48. It is not just a procedural protection for the accused, but rather a reflection of the larger right to a personal defense. This component of the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel *he believes* to be best." *Id.* at 146 (emphasis added).

3. Once a defendant chooses to be represented by counsel, "law and tradition may allocate to the counsel the power to make binding decisions of strategy in many areas." *Faretta*, 422 U.S. at 820. But a defendant retains "ultimate authority to make certain fundamental decisions regarding the case." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (citing *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1977) (Burger, C.J., concurring)).

The Court has not given precise standards for identifying such "fundamental decisions," but examples include the decision to enter a guilty plea[4] (or the functional equivalent of a guilty plea),[5] waive the right to

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[4] *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

[5] *Brookhart v. Janis*, 384 U.S. 1, 6-7 (1966) (counsel lacked authority to agree to a "prima facie" trial that was equivalent to a guilty plea).

a jury trial,[6] waive the right to be present at trial,[7] testify on one's own behalf,[8] and forego an appeal.[9] Lower courts have also held that defendants have the final say on whether to attend important pretrial proceedings,[10] waive the constitutional right to a speedy trial,[11] and enter an insanity plea.[12] And many courts have addressed the precise issue in this case, and held that counsel may not concede guilt at trial over a defendant's express objection. See cases cited *infra*, p. 20.

In general, these "fundamental decisions" speak to one or both of two major sets of questions in which concerns for defendant autonomy are at their peak. First, a defendant has the authority to decide, as a threshold matter, whether to avail himself of certain structural elements of the criminal justice system—i.e., by entering a plea, waiving a jury trial, or taking an appeal. Second, the defendant has final authority over his *personal* involvement (or non-involvement) in his case,

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[6] *Taylor v. Illinois*, 484 U.S. 400, 417-18 & n.24 (1988) (citing *Doughty v. State*, 470 N.E.2d 69, 70 (Ind. 1984)); *Adams v. U.S. ex rel. McCann*, 317 U.S. 269, 277 (1942).

[7] *Taylor*, 484 U.S. at 417-18 & n.24 (citing *Cross v. United States*, 325 F.2d 629, 632-33 (D.C. Cir. 1963)).

[8] *Jones*, 463 U.S. at 751; *see also Rock v. Arkansas*, 483 U.S. 44, 49 (1987) ("[I]t cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense.").

[9] *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *Jones*, 463 U.S. at 751.

[10] *Carter v. Sowders*, 5 F.3d 975, 981-82 (6th Cir. 1993) (deposition); *Don v. Nix*, 886 F.2d 203, 206-207 (8th Cir. 1989) (same); *Garcia v. State*, 492 So.2d 360, 363-64 (Fla. 1986) (pretrial conference).

[11] *Townsend v. Superior Court*, 543 P.2d 619, 624 (Cal. 1975) (distinguishing between the constitutional and statutory right).

[12] *See State v. Bean*, 762 A.2d 1259, 1267 (Vt. 2000) (collecting citations).

and the fundamental goals of his defense—i.e., his attendance at trial and pretrial proceedings, the decision to testify (and what to say), and how to weigh the risks of an adverse verdict or sentence (including whether to take a plea, and whether to admit guilt before the jury). These issues concern not just the *means* by which his objectives will be pursued, but what those objectives actually *are*. *See* Model Rules of Professional Conduct, Rule 1.2 ("A lawyer shall abide by a client's decision concerning the objectives of representation . . . ."); *see also Jones*, 463 U.S. at 753 n.6 (citing this language from the proposed Model Rule 1.2).

B. Defendant autonomy, not ineffective assistance of counsel, is the best framework for understanding a defendant's right to make fundamental decisions in his case.

Disputes over the scope of defendant autonomy generally arise from a conflict between a defendant and his attorney, which means these issues often come before the courts as claims for ineffective assistance of counsel. Thus, Courts sometimes treat the defendant's right to make "fundamental decisions" as a question of what does and does not constitute effective assistance. *See, e.g.*, *Jones*, 463 U.S. at 749-50 (failure of appellate counsel to press the client's desired non-frivolous ground for appeal was not ineffective assistance); *see generally* Wayne R. LaFave, et al., 3 *Criminal Procedure* § 11.6(a) (4th ed. 1992) ("[A] claim of ineffective assistance of counsel . . . is probably the most common avenue for presenting [the] issue [of client control] . . . ."). But conceptually, ineffective assistance jurisprudence is an inapt framework for understanding defendant autonomy.

A claim for ineffective assistance is not complete without prejudice. *Strickland v. Washington*, 466 U.S. 668, 692 (1984). "[T]he requirement of showing prejudice in ineffectiveness claims stems from the very definition of the right at issue; it is not a matter of showing that the violation was harmless, but of showing that a violation of the right to effective representation *occurred*." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006). In the extreme case where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," then "a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *United States v. Cronic*, 466 U.S. 648, 659-60 (1984). But prejudice is still a conceptual component of the claim; the defendant is simply relieved of the duty to affirmatively establish it. *See Florida v. Nixon*, 543 U.S. 175, 190 (2004).

By contrast, a violation of a defendant's *autonomy* is complete whenever counsel (or the court) usurps control of an issue within defendant's sole prerogative; whether the defendant's attorney provided effective representation following the violation is irrelevant. It is therefore no surprise that the constitutional rights securing a defendant's autonomy closely track those rights for which any violations are considered *structural* defects, and not reviewed for harmless error. *See McKaskle*, 465 U.S. at 177 n.8 (self-representation is structural); *Gonzalez-Lopez*, 548 U.S. at 150 (choice of counsel is structural); *Waller v. Georgia*, 467 U.S. 39, 49 & n.9 (1984) (right to a public trial is structural); *Brookhart*, 384 U.S. at 7-8 (automatically reversing

where a functional guilty plea was entered without a defendant's consent).[13]

The functional effect of conflating these two frameworks is that courts will ask the wrong questions when considering matters of defendant autonomy. Courts may focus on the *reasonableness* of the attorney's decision, or the fairness of the final outcome, rather than the centrality of the issue to the defendant's personal autonomy. *See, e.g.*, *Haynes v. Cain*, 298 F.3d 375, 385 (5th Cir. 2002) (en banc) ("[T]rial counsel's [admission to a lesser included offense over defendant's objection] was not deficient under *Strickland*'s first prong and Haynes was certainly not prejudiced by the trial counsel's approach under *Strickland*'s second prong. . . . However, in my view, *Strickland* does not provide the appropriate framework for analyzing this case.") (Parker, J., dissenting).

Exactly such a conflation happened here. McCoy argued before the Louisiana Supreme Court that "the trial court erred in ruling that the defendant's retained counsel could decide whether to concede guilt of the charged murders at trial, without the defendant's consent." *State v. McCoy*, 218 So. 3d 535, 564 (La. 2017)—clearly a claim sounding in autonomy. But the court

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[13] This Court has suggested that denial of a defendant's right to testify warrants automatic reversal. *See Luce v. United States*, 469 U.S. 38, 42 (1984) ("[T]he appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying."). But lower courts have sometimes held that denial of the right is not structural error. *Woolfolk v. Commonwealth*, 339 S.W.3d 411, 418-19 (Ky. 2011) (citing cases). Nevertheless, "it is only the most extraordinary of trials in which a denial of the defendant's right to testify can be said to be harmless beyond a reasonable doubt." *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991) (citing *Luce*).

rejected this position based on reasoning functionally equivalent to an ineffective-assistance standard, noting that "[c]onceding guilt, in the hope of saving a defendant's life at the penalty phase, is a reasonable course of action." *See id.* at 566-67. Maybe so. But transmuting McCoy's claim into one for ineffective assistance sidesteps the thrust of his argument and assumes away his right to decide the issue for himself.[14]

II. OVERRULING A DEFENDANT'S DECISION TO DENY GUILT VIOLATES DEFENDANT AUTONOMY.

1. The purpose of a criminal trial is the just and reliable adjudication of guilt. The defense rights detailed in the Sixth Amendment (and granted personally to the accused), "when taken together, guarantee that a criminal charge may be answered in a manner now considered fundamental to the fair administration of American justice." *Faretta*, 422 U.S. at 818. And hallowed among the pillars of this temple is the presumption of innocence—"that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *In re Winship*, 397 U.S. 358, 363 (1970) (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

But that pillar is smashed and the temple destroyed if an admission of guilt may be forced upon a

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[14] *Amicus* does not intend to suggest that McCoy lacks a viable claim for ineffective assistance of counsel. Defense counsel's admission of McCoy's guilt, impeachment of his own client, and attempted waiver of the burden of proof may well have constituted ineffective assistance under *United States v. Cronic*, 466 U.S. 648 (1984). *See* Br. of Pet'r, at 43-48. The larger point is simply that defendant autonomy is a crucial constitutional value, regardless of the efficacy of counsel's representation.

defendant over his express objection. The rest of a defendant's constitutional rights are hollow and feeble if he lacks authority to muster them toward their ultimate aim—putting the state to its burden of proving guilt beyond a reasonable doubt (a standard that itself has "constitutional stature," *id.* at 364).

The Court characterized the issue in *Faretta* as "whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." 422 U.S. at 807. One could likewise frame the question here as whether a State may constitutionally hale a person into its criminal courts and there force an admission of guilt upon him, even when he insists upon his innocence. Stated as such, the right to maintain one's own innocence is perhaps more fundamental to American justice than any of the other rights encompassed within a defendant's autonomy.

2. The defendant's prerogative to maintain innocence before the jury is not diminished in a capital case, where a guilty verdict carries the risk of death. On the contrary, the heightened consequences make it all the more important to ensure that autonomy is respected. "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 819-20.

Nor is it of any import that a defendant's decision may cause him harm. "Personal liberties are not rooted in the law of averages. . . . [A]lthough [a defendant] may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-351 (1970) (Brennan, J., concurring)). Defendant

autonomy—like all liberty—entails both a privilege to decide and a responsibility to accept the consequences.

Some capital defendants will certainly choose to permit an admission of guilt to minimize the risk of execution. Others may reasonably hold that life in prison—as an admitted murderer in the eyes of the law, their family, and the public—is not a life worth living, and will risk a death sentence for any hope, however small, of exoneration. "Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people." *Martinez*, 528 U.S. at 165 (Scalia, J., concurring in the judgment).

In the related context of guilty pleas, this Court recently held that a defendant can show he would not have pleaded guilty if he knew he could be deported, even though he had no realistic defense:

> But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. . . . Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

Lee v. United States, 137 S. Ct. 1958, 1968-69 (2017).

Just as a defendant has the right to decide how to weigh the risks of refusing a plea, he likewise has the right to decide how to weigh the risks of denying guilt in a capital case. The answer may turn on his philosophical and religious beliefs about death, his relationship with friends and family, the value he places on his own integrity, and inner knowledge of his own guilt or innocence. These are not strategic questions as to how to achieve a client's objectives; they are questions about what the client's objectives actually *are*. And while this Court has not precisely defined what set of decisions are within a defendant's control, it has cited with approval the imperative in the Model Rules of Professional Conduct, that "[a] lawyer shall abide by a client's decision concerning the objectives of representation . . . ." Rule 1.2(a). *See Jones*, 463 U.S. at 753 n.6.

3. *Florida v. Nixon*, 543 U.S. 175 (2004) is not to the contrary. *Nixon* held that counsel's failure to obtain his client's express consent to concede guilt at trial did not necessarily render his representation deficient. *Id.* at 178-79. While superficially similar, *Nixon* involved a fundamentally different question than the one presented here. Like English, Nixon's defense counsel thought his client's best chance to avoid execution was to admit guilt at trial, and he consulted with his client about this strategy. *Id.* at 181. But whereas McCoy clearly and forcefully *objected* to English's plan, Nixon "never verbally approved or protested [his attorney's] proposed strategy," and gave counsel "very little, if any, assistance or direction in preparing the case." *Id.* In other words, McCoy's autonomy was abrogated, but Nixon effectively declined to exercise autonomy at all.

The *Nixon* Court made clear that its holding was specifically premised on the defendant's failure to

make any decision on counsel's proposed strategy. *See id.* at 189 ("*Given* Nixon's constant resistance to answering inquiries put to him by counsel and court, Corin was not additionally required to gain express consent before conceding Nixon's guilt.") (emphasis added) (citation omitted).[15] Therefore *Nixon*, unlike this case, *was* properly evaluated under the *Strickland* standard. *See id.* at 178.

Nixon not only fails to resolve this case in the state's favor, but its logic actually supports McCoy. The *Nixon* Court repeatedly and firmly based its holding on the premise that counsel had (and met) an affirmative duty to consult with his client. *See id.* at 181 ("Corin attempted to explain this strategy to Nixon at least three times."); *id.* at 189 ("Corin was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon."). But this insistence only makes sense if one first assumes the defendant's agency can shape the outcome. If counsel can overrule the defendant's informed and final decision, whence the need for such substantive consultation in the first place? At best, the duty to *consult* would be reduced to a duty to *notify*. *But see Strickland*, 466 U.S. at 688 (separately discussing the duties "to *consult* with the defendant on important decisions" and "to keep the defendant *informed* of important developments in the course of the prosecution") (emphases added).

Nor is there any tension in holding that a defendant has final authority to decide whether to admit guilt

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[15] Nixon's defense counsel likewise justified his ultimate decision based on Nixon's non-participation. *See Florida v. Nixon*, 543 U.S. 175, 182 (2004) ("As [counsel] explained: 'There are many times lawyers make decisions because they have to make them because the client does nothing.'").

at trial, but that a defendant's silence (after consultation with counsel) can show tacit consent to such a strategy. Certain decisions, like the entry of a plea, *do* require express consent. *See Boykin v. Alabama*, 395 U.S. 238, 242 (1969). Stated differently, a defendant may not *tacitly* waive his right to a jury trial. This rule is premised on the fact that a guilty plea is "an event of signal significance" that necessarily waives *all* of a defendant's constitutional trial rights and "is 'itself a conviction.'" *Nixon*, 543 U.S. at 187 (quoting *Boykin*, 395 U.S. at 242). *Brookhart v. Janis* further holds that express consent is necessary for decisions that are the "equivalent of a guilty plea." 384 U.S. 1, 7 (1966).

But a defendant's right to make fundamental decisions is not *inherently* defined by any correlative requirement of express waiver. To the contrary, a defendant often may tacitly waive rights over which he, not his lawyer, nevertheless has final say. For example, a defendant has the right to self-representation, but may acquiesce to representation by counsel if he does not expressly and timely insist on the right. *See Faretta*, 422 U.S. at 807, 821; *United States v. Singleton*, 107 F.3d 1091, 1096 (4th Cir. 1997). A defendant has the right to testify in his own defense, but need not expressly consent to its waiver. *See Siciliano v. Vose*, 834 F.2d 29, 30 (1st Cir. 1987). And a defendant has the right to decide whether to take an appeal, *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000), but may waive the right if he fails to insist on it, *see Peguero v. United States*, 526 U.S. 23, 28 (1999). The right to decide whether to admit guilt to a jury thus fits comfortably within the framework of autonomy rights this Court has already recognized.

4. That this Court has yet to address the precise issue here may speak more to the stunning nature of the question than the difficulty of its resolution. It is hardly surprising that the majority of lower courts to squarely face the question have held that counsel may not concede guilt (or even stipulate to an element of a crime) over the client's express objection. *See, e.g.*, *United States v. Williams*, 632 F.3d 129, 133 (4th Cir. 2011); *United States v. Dago*, 441 F.3d 1238 (10th Cir. 2006); *State v. Humphries*, 336 P.3d 1121, 1125 (Wash. 2014); *People v. Bergerud*, 223 P.3d 686, 699 n.11 (Colo. 2010); *State v. Carter*, 14 P.3d 1138, 1148 (Kan. 2000); *Cooke v. State*, 977 A.2d 803, 849 (Del. 2009); *State v. Anaya*, 592 A.2d 1142, 1145 (N.H. 1991); *State v. Harbison*, 337 S.E.2d 504, 507-08 (N.C. 1985).

The major case on which English and the Louisiana Supreme Court relied for the contrary position was *Haynes v. Cain*, 298 F.3d 375 (5th Cir. 2002) (en banc). *See McCoy*, 218 So. 3d at 565, 571 n.36. In *Haynes*, the Fifth Circuit held that admitting to a lesser included offense over a client's objection did not necessarily amount to ineffective assistance. 298 F.3d at 382. But even there, the defendant did not object in *advance* to the strategy of admitting guilt; rather, it seems he first objected to the admission at trial only *after* his counsel's opening statement. *See id.* at 378.[16]

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[16] *Haynes v. Cain* also differs in that it concerned a collateral claim for ineffective assistance, reviewed under the deferential standards of the Antiterrorism and Effective Death Penalty Act. 298 F.3d 375, 379 (5th Cir. 2002) (en banc). But it still provoked a powerful dissent, arguing that "[t]he Constitution mandates that the decision to concede guilt on a lesser charge must be made by the accused, not his attorney, regardless of how difficult it may be for the attorney to mount a defense on all charges." *Id.* at 389 (Parker, J., dissenting). The Fifth Circuit itself has subsequently

By contrast, McCoy made an informed and timely objection to his attorney's plan to tell the jury he was guilty of murder. McCoy consistently maintained his innocence through every stage of the case. Br. of Pet'r, at 4. As soon as English voiced his intent to admit McCoy's guilt (weeks before trial), McCoy was "completely opposed" to the idea, "told [English] not to make that concession," and tried to end the representation. *Id.* at 8-9. He repeated these protestations at a pre-trial conference—his first opportunity to raise them with the judge—but the court dismissed his concerns.[17] *Id.* at 10. And McCoy again objected to English's admissions during the trial itself, and took the stand in his own defense. *Id.* at 11.

Whatever complications might arise from a situation like the one in *Haynes*, where a defendant fails to object until after the admission, they are not present

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expressed skepticism with the logic of *Haynes*. *See Woodward v. Epps*, 580 F.3d 318, 327 (5th Cir. 2009) ("[T]he trial judge afforded Woodward an opportunity to express disagreement with his counsel's tactics on the record, which he did not. *Had Woodward expressed disagreement with his counsel's strategy* [to admit guilt], this might present a closer question as to whether *Cronic*'s presumption of prejudice applies.") (emphasis added).

[17] The record suggests that McCoy's right to self-representation was impermissibly violated, which alone would warrant automatic reversal. *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). The trial court had *already* held a *Faretta* colloquy and found him competent, Br. of Pet'r, at 5, but denied McCoy's later request to represent himself, *id.* at 10—even though McCoy had an excellent reason for the request and raised it with the court as soon as practicable. Nevertheless, McCoy's autonomy was violated by counsel's admission of guilt, regardless of whether he properly invoked his *Faretta* right. A defendant is not required to choose between the assistance of counsel and the presumption of innocence.

here. Nor does this case involve any of the complications that could potentially arise with a mentally ill defendant unable to represent himself under *Indiana v. Edwards*, 554 U.S. 164 (2008). The trial court found McCoy competent to stand trial, and later expressly found that he was competent to represent himself. Br. of Pet'r, at 4-5. Future cases may call upon the Court to delineate with greater precision the exact boundaries of a defendant's prerogative to decide whether to admit guilt before a jury. But McCoy's case turns only on the most basic version of this question—whether counsel may concede guilt over a defendant's express, informed, and prior objection.

III. FAILURE TO PROTECT DEFENDANT AUTONOMY WILL UNDERMINE THE INTEGRITY OF THE ENTIRE JUDICIAL PROCESS.

The defendant's right to personally make his defense is the core concern of the Sixth Amendment and the chief issue relevant to this appeal. But failure to protect defendant autonomy would also have dire consequences for the criminal justice system as a whole.

"Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988). At times, this imperative may create apparent tension between the institutional interest of the courts and the full exercise of Sixth Amendment rights. *See, e.g., Indiana*, 554 U.S. at 177 (need for the appearance of fairness informs the limitation on self-representation by men-

tally ill defendants); *Wheat*, 486 U.S. at 160 ("institutional interest in the rendition of just verdicts" limits the authority of defendants to waive conflicts of interest in their representation).[18] In this case, however, the defendant's autonomy and the courts' institutional concerns are squarely aligned.

Permitting defense counsel to admit guilt over a defendant's express objection will predictably result in a divided defense before the jury. If a defendant knows that his lawyer plans to admit guilt without his consent, the only means left for him to maintain his innocence is to take the stand and contradict his own attorney. There are a myriad of reasons why even an innocent defendant would still decide to invoke his Fifth Amendment right against self-incrimination—that "great landmark[] in man's struggle to make himself civilized." *Ullmann v. United States*, 350 U.S. 422, 426 (1956) (citation omitted). But where counsel is determined to concede guilt over his client's objection, the accused is effectively forced to relinquish this right to make his defense.

By definition, an innocence defense and an admission-of-guilt strategy will contradict each other. If a defendant chooses to testify—which he clearly has the right to decide on his own, *Rock*, 483 U.S. at 49—then the lawyer is placed in an impossible ethical dilemma. On the one hand, if defense counsel intends to accrue the tactical benefits of admission, he will likely need to

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[18] *But see* Note, *Rethinking the Boundaries of the Sixth Amendment Right to Choice of Counsel*, 124 Harv. L. Rev. 1550, 1562-64 (2011) (arguing that choice of counsel requires the right to waive *potential* conflicts, because a defendant knows better than the prosecutor or judge whether a conflict will actually arise).

cross-examine and impeach his own client, whose testimony will necessarily be adverse to the strategy. But on the other hand, cross-examining his client is itself likely to prejudice the defendant in the eyes of the jury, and may even introduce prejudicial evidence that the prosecution was unable to offer.

Exactly such a conflict occurred in McCoy's trial. *See* Br. of Pet'r, at 14-15. McCoy took the stand to assert his innocence, and English used his examination to impeach him, asking several questions about McCoy's alleged suicide attempts after the shootings, and asserting that McCoy was, in fact, the individual in a video introduced by the prosecution (but whom no prosecution witness could identify as McCoy). He likewise referred to inculpatory evidence that the prosecutor had not actually introduced (call records from a phone allegedly in McCoy's possession the night of the killings). Predictably, neither McCoy nor English succeeded in their respective goals: the jury found McCoy guilty *and* sentenced him to death.

One can appreciate that English was likely trying to do his best in a difficult position—especially in light of his belief that the Fifth Circuit's decision in *Haynes* required him to follow what he saw as the most prudent strategy, notwithstanding his client's objection. *See McCoy*, 218 So. 3d at 625 ("I agree that Mr. English was left with few options in presenting a defense which satisfied both ethical standards [to his client and to the court], and that he chose the best option available.") (Crichton, J., concurring). But the Court need not cast aspersions on English's character, diligence, or integ-

rity to see that the way out of this dilemma is to remove the incentive for a divided defense in the first place, by securing the defendant's autonomy.[19]

Our criminal justice system is premised on adversarial proceedings, and effective, zealous defense counsel is therefore "critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685. But when the defense is divided, the defendant's own attorney, not the prosecutor, becomes his chief adversary. *See United States v. Williamson*, 53 F.3d 1500, 1511 (10th Cir. 1995) ("admission by counsel of his client's guilt to the jury" is a "paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice"). Whatever hope the defendant had of vindicating his innocence is likely destroyed by his attorney's admissions, and any strategic benefit from the admission is likely lost by the defendant's refusal to cooperate. When admission of guilt is forced upon an unwilling defendant, it is not just the accused who "can only . . . believe that the law contrives against him," *Faretta*, 422 U.S. at 834; it is the jury, and the public at large.

Finally, permitting counsel to admit guilt over the defendant's express objection will incentivize more defendants to proceed *pro se*, even if they otherwise would happily have accepted the assistance of counsel. If a defendant cannot reliably count on his own attorney to advocate his innocence—and if he wishes to avoid a divided defense—then his only alternative may

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[19] As argued in detail in McCoy's merits brief, it is never contrary to defense counsel's ethical obligations to insist on putting the state to its burden, if the defendant has made an informed and voluntary decision to assert innocence. *See* Br. of Pet'r, at 32-38.

be to dispense with counsel entirely. Indeed, McCoy attempted to do exactly that once the court rejected his request to dismiss English.

The right to self-representation is itself central to defendant autonomy, but even the *Faretta* majority said it was "undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." 422 U.S. at 834. And the fair management of criminal trials is typically far more frustrating and difficult for courts when defendants elect to proceed *pro se*. *See Martinez*, 528 U.S. at 164 ("[J]udges closer to the firing line have sometimes expressed dismay about the practical consequences of [*Faretta*].") (Breyer, J., concurring).

Such considerations do not warrant denying self-representation to those defendants firmly committed to that path. But they *do* provide ample justification to avoid restricting defendant autonomy in a manner that makes the right essential for defendants committed to vindicating their innocence. Although McCoy was willing and able to represent himself, defendants are not put to such a choice. The assistance of counsel functions as "an aid to a willing defendant," and counsel must ultimately act as "an assistant" to the defense, not its "master." *Faretta*, 422 U.S. at 820. A defendant has the right both to the effective assistance of counsel, *and* to be the master of his own defense.

CONCLUSION

For the foregoing reasons, and those described by the Petitioner, this Court should reverse the lower court's judgment.

Respectfully submitted,

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Supreme Court of the United States

ROBERT McCOY,

Petitioner,

v.

THE STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

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INTEREST OF AMICUS

The Criminal Bar Association of England and Wales ("C.B.A.") was formed in 1969, and currently has nearly 4000 members. The C.B.A. provides continuing professional development, accreditation, information about the law, programs to assist barristers in their work, and advice and initiatives to improve the Criminal Justice System for the public.[1]

The members of the C.B.A. have a profound interest in, as well as knowledge of, the U.K. criminal justice system, including its history, stretching back hundreds of years. Members of the C.B.A. have academic as well as practical experience in the evolution of the common law. Because of the shared history of the U.K. and the U.S. legal systems, and its relevance to this case, *Amicus* hopes that its commentary on that evolution can be of assistance to this Court.

SUMMARY OF ARGUMENT

One manner of seeking an informed understanding of the bill of rights amendments to the U.S. Constitution is to consider what a particular constitutional provision would have meant to the Framers at the time the Bill of Rights was debated and adopted.

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1. Pursuant to Rule 37 of this court, no counsel for a party authored the brief in whole or in part and no counsel for a party, or a party, made a monetary contribution intended to fund the preparation or submission of the brief. Both parties have consented to the filing of this brief.

The practice of the English[2] courts in the mid-eighteenth century informs both the evil from which the Framers sought to protect U.S. citizens, and the manner in which an Amendment was intended to provide that protection.

As we understand it, the question presented to this Court is whether it violates a criminal defendant's Sixth Amendment right to the assistance of counsel if defense counsel concedes the defendant's guilt over the defendant's express objection?

As we show below, in the mid-eighteenth century, barristers and solicitors played narrow, clearly defined roles, when they appeared for the defense. The prosecution of a British citizen focused upon the defendant himself. The law required that he personally enter his plea, and only the defendant could argue his case to the jury. Thus, no English legal practitioner could rise to his feet and argue his client's guilt to the jury, much less declare his guilt against the defendant's express instructions. These traditions have carried forward to the present. It is the

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2. There are significant distinctions in this regard between geographical nomenclatures – for example, England, the United Kingdom and Great Britain all refer to different elements of the British Isles, and this does not take account of the Empire that existed in the eighteenth-century. To be sure, England, Wales and Scotland have had the same monarch since 1603 (along, at different times, with parts of Ireland), and the Treaty of Union between England and Scotland was signed in 1706. However, certain legal traditions have always been different in Scotland. For the sake of simplicity, *Amicus* will refer to the law "of England" at the time, albeit as elucidated by decisions from other countries in what was once the British Empire.

defendant, not his counsel, who selects his defense, and counsel is duty-bound to carry it through. What took place in this case would be viewed as a patent, structural violation of the law in commonwealth jurisdictions, such that reversal of the conviction would be automatic.

ARGUMENT

I. BEFORE 1791: COUNSEL PLAYED A LIMITED, MODEST ROLE IN REPRESENTING CLIENTS FACING CRIMINAL CHARGES; ONLY THE DEFENDANT COULD DETERMINE AND ARGUE HIS DEFENSE

The Sixth Amendment's guarantee to the *assistance* of counsel was adopted at a time when counsel were just beginning to appear for the defense in eighteenth-century England. Until the passing of The Trials for Felony Act, 1836, 6 & 7 Will. 4, c. 114, persons accused of felonies (apart from high treason, since 1696) had no right to be represented by counsel at their trial. The rationale for not requiring the assistance of counsel was given by Hawkins in *A Treatise of Pleas of the Crown* (1721):[3]

> It requires no manner of Skill to make a plain and honest Defence, which ... is always the best; the Simplicity and Innocence, artless and ingenuous Behaviour of one whose Conscience acquits him, having something in it more moving and convincing than the highest Eloquence of a Person speaking in a cause not their own.

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3. 2 William Hawkins, *A Treatise of the Pleas of the Crown* 400 (London, Eliz. Nutt and R. Gosling 1721)

As this passage shows, the defendant's direct participation in his trial was considered all-important. Arraignment had to take place in person. In most trials in the late 1700's, the defendant represented himself. He would cross-examine prosecution witnesses, present his own defense and witnesses, and argue to the jury why he should not be convicted, or convicted of a lesser crime.

Barristers and solicitors began to appear as defense counsel in the later part of the eighteenth-century in large part in response to their increasing use by the prosecution. When they did appear for the defense, however, their role focused on discreet tasks. These advocates were limited to arguing points of law, beginning at arraignment, and later at trial. Due to the harsh penalties that attached to many offenses, lawyers became adept at advancing technical points to lessen the charge.[4] As time went by, they were allowed to cross-examine some prosecution witnesses. But the defendant remained the central figure in his own defense, and only the defendant could raise his defense and argue it to the jury. As legal scholars have confirmed: "Counsel were not allowed, however, to act in those areas in which defendants had always been on their own. In particular, counsel were not allowed to speak to the jury on their client's behalf or to offer a defense against the facts put in evidence."[5] That was the client's responsibility.

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4. *See* John H. Langbein, *The Origins of Adversary Criminal Trial* 169-170 (2003)

5. John M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 Law & Hist. Rev. 221, 230-31 (1991).

Thus, defense advocacy in the eighteenth-century was sharply confined. It was the defendant who made the all-important decisions regarding his defense. Counsel could offer assistance limited to arguing points of law and cross-examining some prosecution witnesses.

There is nothing in the common law history of counsel-client relations before the adoption of the Bill of Rights to suggest that such assistance empowered the advocate to ignore or override the client's manifest instruction as to his plea and defense. Given the evolving but still limited role of defense counsel, it is not surprising the Sixth Amendment – ratified in 1791 – guaranteed that a person facing imprisonment should be permitted the "*assistance* of counsel for his defense".

II. IN COMMON LAW JURISDICTIONS TODAY COUNSEL MAY NOT CONCEDE GUILT AGAINST INSTRUCTIONS FROM THE CLIENT

This tradition, that the defendant, not learned counsel, controls what his defense to the criminal charge will be, continues to this day. To our knowledge, all common law jurisdictions adhere to the eighteenth-century practice that the defendant determines the fundamental objectives regarding his defense. The client controls the all-important decisions of how to plead and what his defense shall be, and the lawyer must follow his client's instructions. This balance of power is reflected both in case law and professional conduct regulations. Counsel may advise and advocate vigorously as to what the plea and defense shall be. But once the client has given instructions, the lawyer must act to carry out the defense, so long as they don't offend ethical canons. Under no circumstances,

may counsel ignore the instructions and concede guilt.[6] We review the practice in several of these jurisdictions below.

A. England and Wales

In England and Wales, statements of guilt must be made in person by the accused and, in the case of submissions, by counsel in accordance with the client's wishes. *R. v. Ellis*, (1973) 57 Cr. App. R. 571 (Eng.). Barristers must not put forward any case inconsistent with their client's instructions. In *R. v. Clinton* [1993] 1 W.L.R. 1181 (1993) 2 All E.R. 998 (Eng.), the Court of Appeal considered the question of departure from instructions:

> The court was rightly concerned to emphasise that where counsel had made decisions in good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with his client, such decisions could not possibly be said to render a subsequent verdict unsafe or unsatisfactory.

Id. at 1187.

Conversely, the court held, where a decision was taken "either *in defiance of or without proper instructions*," the situation is reversed. Then, the conviction is unsafe. *Id. at 1187-88.* For example, in *R. v. Irwin* [1987] 1 W.L.R.

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6. To be clear on one issue: counsel may find himself professionally embarrassed, and therefore unable to proceed on a case consistent with the client's instructions. That is a separate issue, and counsel may have a duty to withdraw from the case. But never may counsel remain on the case and go against the client's instruction to present a defense of not guilty.

902, (1987) 2 All E.R. 1085 (Eng.), two alibi witnesses had been presented to an initial, hung jury. At the second trial, counsel decided, without consulting with his client, not to present the alibi defense. This course of action was condemned by the reviewing court and the conviction was reversed.

> Certain it is, whether that supposition is correct or not, that he made no communication of his intention to his client. If he had done so he would have been, in the view of this Court, fully entitled, no doubt explaining his reasons, to give his client the appellant very strong advice. The appellant might then have accepted that advice. He might have declined to accept it and insisted on the witnesses being called. Counsel might then have accepted his instructions and called the witnesses or he might have asked the learned recorder to discharge him from further service to his client. Yet a further possibility is that the appellant himself, dissatisfied with the advice, might have asked the recorder to adjourn the case to allow a re-trial, to allow him other counsel even at that stage or to permit him to continue the case on his own. All those possibilities would have been dealt with if they had arisen, no doubt in an appropriate manner. None of them did arise for the simple reason that the appellant was not given any opportunity of protesting against his counsel's decision. In those circumstances it is immaterial whether the decision of counsel was right or wrong.

In England and Wales, this legal rule is buttressed by counsel's ethical duties that confirm the client decides the objectives of the representation:

> You are obliged ... to promote and to protect your client's interests so far as that is consistent with the law and with your overriding duty to the court... Your duty to the court does not prevent you from putting forward your client's case simply because you do not believe that the facts are as your client states them to be (or as you, on your client's behalf, state them to be), as long as any positive case you put forward accords with your instructions and you do not mislead the court. *Your role when acting as an advocate or conducting litigation is to present your client's case, and it is not for you to decide whether your client's case is to be believed.*[7]

Indeed, as a matter of English practice, it amounts to misleading the court for the barrister to put forward a case that is inconsistent with the client's instructions.[8] The barrister in *R. v. Clinton* was subject to an ethical complaint, and *Amicus* would expect the same to happen to any criminal barrister who conceded the client's guilt against his client's instructions.

B. Other Common Law Jurisdictions Adhere to this Approach

Other countries share this view that it is the client who determines the plea and defense and counsel is required to

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7. Bar Standards Board, *The Bar Standards Board Handbook* C. The Conduct Rules, C1. You and the Court at gC6 (3rd ed. April 2017) *available at* https://www.barstandardsboard.org.uk/media/1826458/bsb_handbook_31_march_2017.pdf (last visited Nov. 7 2017)

8. Susan Blake, *A Practical Approach to Effective Litigation*, § 24.38 (8th ed. 2016)

advance that defense. In Australia, long settled precedent forbids counsel from conceding guilt and abandoning his client's defense. In *Tuckiar v. The King*, [1934] HCA 49, (1934) 52 CLR 335, (Austl.) defense counsel disclosed a privileged communication impeaching the client and failed to request an acquittal. The client was subsequently convicted and sentenced to death. In overturning the conviction, the High Court referred to counsel's conduct as "indefensible" and a "grave mistake." *Id.* at 354. "Why he should have conceived himself to have been in such a predicament, it is not easy for those experienced in advocacy to understand. He had a plain duty, both to his client and to the Court, to press such rational considerations as the evidence fairly gave rise to in favour of complete acquittal or conviction of manslaughter only . . . ." *Id.* at 346. The High Court confirmed that counsel could not abandon his [client's] defense. *Id.*

The Australian rule is well stated in the textbook by Dal Pont:

> Having accepted a brief, a defence lawyer is duty bound to defend the accused irrespective of any belief or opinion he or she may have formed as to the accused's guilt or innocence. Assessment of guilt or innocence is for the court, not counsel. In the well-known words of Bramwell, B: "A client is entitled to say to his counsel, 'I want your advocacy and not your judgment; I prefer that of the court.'"[9]

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9. Gino Dal Pont, *Lawyers' Professional Responsibility* 604 (5th ed. 2012) (footnotes omitted), citing *Emerson v. Sparrow* (1871) LR 6 Ex 329, 371.

Defense counsel cannot depart from the client's instructions, after a plea of not guilty, by making statements to the decision maker to the effect that the defendant is guilty. The defendant's right to personally plead has statutory force and must be respected. Counsel may not deviate from the client's instructions when it comes to whether they will plead guilty, or whether they will give evidence.[10]

In New Zealand, defense counsel is not entitled to disregard the instructions of the defendant with respect to the nature of the defense. *R. v. McLoughlin* [1985] 1 NZLR 106 (CA). In *McLoughlin*, the defendant instructed counsel to present an alibi defense to a rape charge. Counsel took the view that this defense was implausible, and instead presented a consent defense. The court held that counsel was not entitled to defy the instructions of a client. It held that a failure to follow instructions gives rise to a miscarriage of justice. The court observed:

> It is basic in our law that an accused person receive a full and fair trial. That principle requires that the accused be afforded every proper opportunity to put his defence to the jury (cf s 354 of the Crimes Act 1961). The present appellant has been deprived of that opportunity and justice has therefore been denied to him. Such a denial can be made good only by the ordering of a new trial.

Id. at 107.

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10. Dal Pont, *Lawyers' Professional Responsibility* at 608.

In New Zealand, departure from a client's instructed plea is also a violation of the rules of professional conduct. The ethical duties placed on the defense lawyer are set out in the New Zealand Lawyers and Conveyancers Act Rules 2008. These rules set a clear balance towards respecting the client's wishes. Short of misleading the court, a defence lawyer must "put before the court any proper defence in accordance with his or her client's instructions..."[11]

The practice is the same in Scotland. It is for the accused to decide whether he wishes to plead guilty and defense counsel, referred to as an advocate, must follow the client's instructions regarding the defense. The courts there have confirmed that when an advocate advances a defense against the client's clear instructions, the conviction must be reversed. *Anderson v. H. M. Advocate* [1996] J.C. 39 (Scot.). A fair determination of guilt cannot occur when

> the accused was deprived of the opportunity to present his defence, *or because his counsel or solicitor acted contrary to his instructions as to the defence which he wished to be put* or because of other conduct which had the effect that, because his defence was not presented to the court, a fair trial was denied to him.

Id. at 44 (emphasis supplied).

The duty of the advocate to carry out the defense as instructed by the client is confirmed by the Faculty of Advocates' Code of Conduct, and strongly supports the rule proposed by Petitioner:

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11. Lawyers and Conveyancers Act Rules 2008 Rule 13.13(b) (N.Z.)

> An Advocate is however obliged to follow instructions as to basic matters such as the line of defence in criminal cases. If he is unable to do so in a manner which allows him to fulfil his duties to the Court he should withdraw from acting.[12]

In Ireland, the duty of counsel to adhere to the defendant's choice of defense is found in the canons of ethics. The ethical duties of the barrister provide that it will be a breach to concede the guilt of a client who maintains their innocence.

Where the client maintains innocence, defence lawyers are obliged to attempt to expose weaknesses in the prosecution case.[13] Section 10.14 of the Code of Conduct for the Bar of Ireland provides that:

> Barristers are under a duty to defend any accused person on whose behalf they are instructed irrespective of any belief or opinion they may have formed as to the guilt or innocence of that person.

In Canada, the accused has the autonomy to determine the fundamental objectives of the defense, as well as the decision of how to plead, and counsel is obligated to follow the client's instructions'. *R. v. Szostak* (2012), 111 O.R. 3d

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12. Faculty of Advocates, *Guide to the Professional Conduct of Advocates* § 1.2.3, (Oct. 2008), http://www.advocates.org.uk/media/1417/guide-to-conduct-fifth-edition.pdf (last accessed Nov. 17, 2017)

13. Thomas O'Malley, *The Criminal Process* § 14.48 (2009).

241 (Can. Ont. C.A.). In *Szostak*, the defendant appealed his conviction arguing that trial counsel raised his fitness to stand trial without instructions. Although the court dismissed appellant's case for failure to prove that counsel defied his instructions, it asserted that "control over the defence is a necessary consequence of the values of dignity and autonomy that underlie our adversarial system." *Id.* at 77. The court further stated:

> [C]ounsel must obtain instructions about decisions fundamental to the defence of a case. In my view, that includes obtaining instructions as to whether or not to pursue a [not criminally responsible on account of disorder] defense. Accused persons provided with all the necessary information may act irresponsibly and against their own best interests, but that is their right.

Id. at 78.

In Canada, departure from a client's instructed plea is a violation of the rules of professional conduct. As the court held in *R. v. G.D.B.*, [2000] 15 C.R. 520 (Can.) "there are decisions such as whether or not to plead guilty, or whether or not to testify that defence counsel are ethically bound to discuss with the client and regarding which they must obtain instructions." *Id.* at 533. The ethical duties of lawyers are detailed in the *Law Society of Alberta Code of Conduct 2017*. These rules obligate the lawyer to follow a client's instructions on certain fundamental decisions regarding litigation. According to Rule 3.2-4[2], a lawyer must obtain instructions from the client on "[c]ertain decisions in litigation, such as how a criminal defendant will plead, whether a client will testify, whether to waive

a jury trial and whether to appeal..."[14] Rule 5.1-1 provides that "a lawyer must represent the client resolutely and honourably." Where a client admits guilt to his lawyer, the lawyer is "entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged..." *Id.*

In South Africa, counsel must follow the client's instructions and cannot make fatal concessions that harm his client's defense. In *S v. Mofokeng* 2004 (1) SACR 349 (W), Louw AJ said:

> Counsel also is not the judge. He does not have, nor should he have, the distance to adjudicate on the strength and weaknesses of his client's cause. He must, of course, advise his client on the probable findings of the court but he must fearlessly argue his client's case even if he, himself, does not believe that the case is right or just. Whilst he is an officer of the court, he is a representative of a litigant and he does not have the luxury to distance himself from his client's instructions and to *condemn his client by making fatal concessions.* In the final analysis, he is but a representative of his client, a mandatory. It is his duty to carry out his mandate and to take all reasonable steps to accomplish his aim. He must perform his obligations in accordance with the terms and

14. Law Society of Alberta, Code of Conduct (Sept. 28, 2017), http://dvbat5idxh7ib.cloudfront.net/wp-content/uploads/2017/01/14211909/Code.pdf. (last accessed Nov. 19, 2017)

> limitations of his mandate. If he does not do so, he is no representative.
>
> * * *
>
> [W]ithin the four corners of the ethics which bind each defence advocate, counsel is not free to make submissions designed to destroy his client's case, or which may have that effect. He is, of course, in control of the presentation of the defence case... and he may otherwise bind his client through "vicarious admissions"... but where he, to the knowledge of the court, refutes his instructions, he fails to act as a representative.

Id. at ¶ at 35g-i, 357f-g (emphasis supplied).

In his commentary on South African law, Étienne du Toit writes that:

> "Grave incompetence, resulting in a fatal irregularity, is present where a legal representative ... does not establish the defence of his client..."[15]

Thus, South African law goes further than the rule sought by Petitioner. In *S. v. Mafu and Others* 2008 (2) ALL SA 657 (W) (S.Afr.) at ¶15, for example, counsel's failure to put an affirmative alibi defense was held to breach "the very rudimentary duties of counsel when defending an accused."

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15. Étienne du Toit, *et al.*, *Commentary on the Criminal Procedure Act* ¶¶ 11-42E (1987)

Various countries in the West Indies – Jamaica, Trinidad & Tobago (T&T), for example – have individual courts that grew out of the English legal tradition. There is no significant difference between the approaches of the different courts.

In these countries, defense counsel has no power to depart from the client's instructions on the issue of guilt, or to make representations that the defendant is in fact guilty. While counsel cannot propose an affirmative defense if the client says it is untrue, short of this a lawyer should follow the client's instructions as to the case. *See Boodram v. The State* [2002] UKPC 20.[16] (T&T).

The Privy Council has held that the approach to departures from pleas reflects the one set out in *Anderson v. H. M. Advocate*, the rule in Scotland. Counsel may not depart from the substance of their client's plea, and fail to present their defence. *Balson v. The State* [2005] UKPC 2 (Dominica) at ¶36

Indeed, the West Indian practice reflects a rule broader than the one claimed by Petitioner McCoy. In *Ebanks v. R.*, (2006) UKPC 16, a Privy Council case that originated from the Cayman Islands but referenced law from Trinidad and Tobago, the appellant alleged that counsel had "defied his instructions" by not challenging police evidence.[17] Lord Rodger said that even if counsel deemed it tactically inadvisable, "counsel must carry out

16. *See also* Dana S. Seetahal, *Commonwealth Caribbean Criminal Practice and Procedure* 230 (4th ed. 2014).

17. *Id.* ¶31.

[his client's] instructions even though he was aware"[18] of the adverse impact they might have on the case. He went on to say that "even if [the appellant] had all along said that he would not give evidence, that would not, of itself, have been a reason why counsel could not have cross-examined the police officers to the effect that he had not made the statement, if [the appellant's] instructions were that counsel should do so. Indeed, as a matter of proper professional practice, he would still have been bound to do so." *Id. at* ¶30.

An authoritative treatise on Caribbean practice emphasizes "the necessity on the part of defence counsel to take written instructions and to act on those instructions. If counsel finds that he cannot do so, he must so indicate and seek leave to withdraw from the defence."[19] Indeed, as *Amicus* has illustrated, this is the basic rule across the common law world.

In Kenya, a Kenyan advocate must follow the client's legal instructions.[20] There is no reported case where a defense counsel has taken a position that is contrary to their client's instructions with regards to the plea.

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18. *Id.* ¶28.

19. Seetahal, *Commonwealth Caribbean: Criminal Practice and Procedure* 230.

20. As of September 2015, 21 Kenyan lawyers had been charged by the Law Society of Kenya with the specific offence of failing to comply with the client's instructions: Law Society of Kenya, Code of Ethics and Conduct for Advocates, (Sept 2015), *http://www.lsk.or.ke/Downloads/LSK-CODE-OF-CONDUCT-AND-ETHICS-FOR-ADVOCATES-(1ST%20DRAFT).pdf* (last accessed Nov. 20, 2017)

CONCLUSION

The common law tradition, developed over centuries across the English-speaking world, mandates that if the client gives clear instruction that his defense is to be "not guilty", defense counsel is required to honor that instruction and is forbidden to argue his client is guilty.

Respectfully submitted,

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November 20, 2017

No. 16-8255

In The
Supreme Court of the United States

ROBERT MCCOY, *PETITIONER*,
v.
STATE OF LOUISIANA, *RESPONDENT*.

ON WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.[1]

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 members with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL files numerous *amicus* briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

Amicus has a particular interest in this case because the Supreme Court of Louisiana's decision concerns the practice and expertise of criminal

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than *amicus* or its counsel made such a monetary contribution. The parties have consented to the filing of this *amicus* brief.

defense lawyers and the proper constitutional protections for criminal defendants.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Florida v. Nixon*, 543 U.S. 175 (2004), this Court addressed a situation in which a defendant's counsel explained that he would concede guilt at the guilt phase of a capital trial, and the defendant neither granted nor withheld consent. The Court did not consider the materially different circumstances presented when a defendant expressly instructs his lawyer not to concede guilt at the first phase of a capital trial.

When a defendant provides such an explicit instruction to his attorney, the client's decision must control on that fundamental issue. Indeed, perhaps no decision is more fundamental to one criminally accused than whether to concede guilt on the charged offense. That decision belongs to the defendant, not to the lawyer, and, when the defendant communicates an express desire on that ultimate issue, the lawyer must heed it.

As Petitioner explains, this right is embedded as a Constitutional guarantee in both the text and origins of the Sixth Amendment. Pet'r's Br. 21-32. *Amicus* agrees with Petitioner's analysis of the foundation of this fundamental right. In addition, and relatedly, this Court has emphasized that the Fifth and Sixth Amendments reflect a core principle that must be honored on an issue as central to a criminal trial as the decision whether to concede guilt: respect for the individual rights and decision-

making of the defendant, whose life and liberty are at stake.

To be sure, in serving their clients, defense lawyers recognize that conceding certain issues can sometimes be a sound trial strategy. This strategy, however, cannot subvert core constitutional protections or deprive the defendant of the basic right to present a defense. Accordingly, defense lawyers may not concede guilt over a client's express objection. Permitting defense counsel to do so usurps the defendant's ability to make the most critical decision in responding to the State's threat to the defendant's life and liberty.

ARGUMENT

THE ACCUSED'S EXPRESS DECISION WHETHER TO CONCEDE GUILT IS PROTECTED BY THE FIFTH AND SIXTH AMENDMENTS

A criminal defendant's decision whether to concede guilt implicates core principles and fundamental constitutional rights. The right to exercise that decision on the central issue of the criminal proceeding is protected under the Fifth and Sixth Amendments. Accordingly, defense lawyers must honor a defendant's express decision to maintain his innocence and not concede guilt.

A. Failure To Heed A Client's Decision To Maintain His Innocence Violates Fundamental Rights

A criminal defendant's express refusal to concede guilt is safeguarded by core constitutional protections. A defendant retains the "ultimate

authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). These decisions are grounded in inherently personal rights, and fundamental fairness requires that the accused retain the autonomy to decide them. *See Gonzalez v. United States*, 553 U.S. 242, 250 (2008). A concession of guilt by the defense lawyer where the defendant's clear and unequivocally expressed decision is to maintain his innocence necessarily injures these constitutional protections.

1. Conceding Guilt Against a Client's Express Desire Compromises the Fundamental Right to Plead Not Guilty

Allowing counsel to concede guilt over the client's express objection would deprive the defendant of his fundamental right to plead not guilty. The plea decision is an indispensable choice for the defendant alone to make. *Jones*, 463 U.S. at 751; *see also Gonzalez*, 533 U.S. at 247-48. And defense counsel is ethically required to follow the client's plea decision. *Jones*, 463 U.S. at 753 n.6; ABA Model Rules of Prof'l Conduct, r. 1.2 (2016). Indeed, if defense counsel seeks to enter a guilty plea on behalf of a client, the record must be clear that the client has given informed consent to the guilty plea. *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966).

Through a plea of not guilty, the defendant requires the prosecution to carry its constitutional burden and prove his guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *see also Cooke*, 977 A.2d at 843. The decision to plead

not guilty reflects the defendant's choice of his ultimate trial objective: to secure an acquittal. Regardless of the lawyer's view of the likelihood of success, a refusal to honor this particular wish of the defendant has been recognized as a severe infringement of the client's constitutionally protected decision to plead not guilty. *See, e.g., Cooke*, 977 A.2d at 843. Moreover, in defying the defendant through this unauthorized concession, counsel unfairly and irrevocably eliminates potential arguments otherwise available to a client choosing to plead not guilty. *People v. Bergerud*, 223 P.3d 686, 699 (Colo. 2010).

To be sure, in circumstances where the defendant has expressed no opinion about conceding guilt, this Court has held that a concession of guilt is not the functional equivalent of a guilty plea. *Nixon*, 543 U.S. at 187-88. When a defendant expressly and unequivocally objects to conceding guilt, however, such a concession by counsel necessarily infringes on the defendant's fundamental choice to plead not guilty. By conceding guilt over the client's express desire to plead not guilty, defense counsel violates the constitutional protections enshrined in the Fifth Amendment (with its protection against self-incrimination) and the Sixth Amendment (with its right of the criminal defendant to "the Assistance of Counsel," rather than a requirement of submission to counsel on guilt-or-innocence).

2. Conceding Guilt Against a Client's Express Desire Compromises the Fundamental Right Regarding Testimony on One's Own Behalf

The decision of a defendant to testify on his own behalf is a right essential to our adversary system. *Riggins v. Nevada*, 504 U.S. 127, 144 (1992). Indeed, every criminal defendant is privileged to testify in his own defense, or to refuse to do so. *Rock v. Arkansas*, 483 U.S. 44, 53 (1987). Here too, however, defense counsel's decision to concede guilt over the defendant's express objection effectively nullifies this right. *See, e.g.*, *Bergerud*, 223 P.3d at 702; *Cooke*, 977 A.2d at 843-44; *State v. Anaya*, 592 A.2d 1142, 1147 (N.H. 1991).

The right to testify and maintain one's innocence, or to remain silent in one's own defense, would be illusory if counsel could pursue a strategy to concede guilt despite the defendant's objection. Should a defendant testify to his innocence, his counsel's concession would effectively instruct the jury to ignore the defendant's statements. *See Bergerud*, 223 P.3d at 702. Moreover, where a defendant may want to remain silent, he may feel forced against his wishes to testify on his own behalf to defend against his own counsel's concession of his guilt. Such a result renders the client's individual right to decide whether to testify meaningless.

The decision whether to testify on one's own behalf is a fundamental choice reserved for defendants alone. *Jones*, 463 U.S. at 751; *Riggins*, 504 U.S. at 144 (1992); *Rock*, 483 U.S. at 52-53; *see also Cooke*, 977 A.2d at 843. To allow counsel to

contradict the essence of the defendant's decision regarding testimony would make counsel the "master" rather than the "assistant" and thus strip the defense of the personal character that the Constitution demands. *Faretta v. California*, 422 U.S. 806, 820 (1975); *see also Bergerud*, 223 P.3d at 702.

B. A Defense Lawyer's Trial Strategy May Not Override A Client's Express Decision To Maintain Innocence

Defense counsel may not employ a trial strategy that overrides a defendant's express decision to maintain innocence. Certainly, conceding particular factual or legal issues at trial can sometimes be a useful trial tactic, and many concessions will not rise to the level of constitutional harm. Indeed, at times, conceding guilt may be a reasonable strategy in capital cases. Despite these potential strategic advantages, however, a defense lawyer's preferred approach on the core issue of guilt or innocence may not supersede the defendant's express, constitutionally protected decision to maintain innocence.

1. Making Concessions Can Be a Sound Trial Strategy

Careful and strategic concessions may play a legitimate role in criminal cases. Concessions may, for example, preserve credibility or focus the jury's attention on the most material and advantageous issues in a case. Particularly in bifurcated capital cases, concessions of guilt at times may seem helpful in focusing the jury's attention on the penalty phase

and limiting the jury's exposure to damaging facts. *Nixon*, 543 U.S. at 562-63.

The determination, however, on this bedrock issue—the guilt or innocence of the defendant—cannot supersede express constitutional protections that guard a defendant's dignity and autonomy. *See McKaskle v. Wiggins*, 465 U.S. 168, 176-78 (1984) (recognizing a defendant's dignity and autonomy interests in his case); *Faretta*, 422 U.S. at 834 (finding the right to self-representation at trial grounded in part in a respect for individual autonomy); *see also Cooke*, 977 A.2d at 842 ("[T]he defendant has autonomy to make the most basic decisions affecting his case . . . .").

2. Regardless of Potential Strategic Advantages, Defense Lawyers May Not Override a Client's Express Desire to Maintain Innocence

In general, a lawyer has "full authority to manage the conduct of the trial." *Taylor v. Illinois*, 484 U.S. 400, 418 (1998). As a result, a lawyer typically does not need to obtain the client's consent for every tactical trial decision. *See, e.g., id.*; *New York v. Hill*, 528 U.S. 110, 114 (2000) (decisions about scheduling and certain evidentiary objections); *Jones*, 463 U.S. at 751 (decisions about nonfrivolous appellate arguments). But a client's decision to maintain his innocence does not constitute mere "trial conduct" or a plain-vanilla strategic decision. Rather, the decision whether to concede guilt goes to the heart of the defendant's right to present a defense to a jury of his peers.

In a capital case, conflicts may arise between a defense lawyer's desire to determine trial strategy and the defendant's decision whether to concede guilt. For example, a lawyer has a duty to zealously pursue her client's best interests. *See* Model Rules of Prof'l Conduct r. 1.3 cmt. 1 (Am. Bar Ass'n 2016) ("A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). As a result, a lawyer may, in her professional judgment, conclude that conceding guilt is the course most likely to secure a sentence other than death. The accused nevertheless may wish to maintain a claim of innocence at trial, perhaps because he values even a remote possibility of an acquittal more than he values the difference between a sentence of life or death. Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. Rev. 1147, 1178 (2010). This can create a sense of conflict for even the most ethical attorney. *See People v. Frierson*, 705 P.2d 396, 404 (Cal. 1985) ("[A] defendant's right to insist that a defense be presented . . . will inevitably impinge on defense counsel's handling of the case."); *see also Cooke*, 977 A.2d at 841-42.

Our Constitution places this profound decision in the hands of the defendant. The choice of whether to maintain innocence is not a mere matter of trial strategy, but instead a fundamental individual right belonging to the defendant. *See Jones*, 463 U.S. at 751; *see also Frierson*, 705 P.2d at 402 ("[A]lthough it is sometimes stated, as a rule of thumb, that matters of trial strategy and tactics rest exclusively within the discretion of counsel, the fact that the trial attorney's [decision to forgo presenting a defense] . . .

was motivated by strategic considerations does not foreclose inquiry into whether the decision . . . was of such fundamental importance . . . that [the] defendant's wishes should have been respected." (internal quotation marks and citation omitted)); Model Rule of Prof'l Conduct r. 1.2(a) (requiring lawyers to "abide by a client's decisions concerning the objectives of representation").

As this Court has noted, "[t]he right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction." *Faretta*, 422 U.S. at 834; *see Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) ("[T]he defendant's right to conduct his own defense . . . . is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." (citing *Faretta*, 422 U.S. at 834)); *Frierson*, 705 P.2d at 403 ("Given the magnitude of the consequences that flowed from the decision whether or not to present any defense . . . counsel could [not] properly refuse to honor [the] defendant's clearly expressed desire to present a defense . . . ."). Counsel may not "demand that the defendant follow what counsel perceives as the desirable course," because ultimately, the defendant is entitled to make those fundamental trial decisions that are so critical to his fate. Standards for Criminal Justice: Prosecution Function & Defense Function, pt. 1, Standard 4-5.2 (Am. Bar Ass'n 1993).

Even in the most dire of circumstances, those affecting the potential for the death penalty, the decision whether to concede guilt remains in the defendant's purview. The Court has recognized that

a defendant's right to make fundamental decisions about his case, such as whether to represent himself, stems not from "the belief that he thereby stands a better chance of winning his case, but rather out of deference to the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law." *Wiggins*, 465 U.S. at 198 n.6 (internal quotation marks omitted); *see Faretta*, 422 U.S. at 834 (recognizing that "although [a *pro se* criminal defendant] may conduct his own defense ultimately to his own detriment, his choice [to represent himself] must be honored out of 'that respect for the individual which is the lifeblood of the law'"). Thus, the accused is entitled to decide whether to concede guilt, and counsel must honor that decision, regardless of whether, in the counsel's view, the decision to maintain a claim of innocence likely will prove detrimental. *See Frierson*, 705 P.2d at 404 (recognizing that when "a defendant chooses to exercise a personal right . . . over counsel's contrary advice[,] . . . . the attorney's obligation is simply to provide the best representation that he can *under the circumstances*" (emphasis in original)); 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 23 cmt. C, at 186 (2000) ("However, a lawyer has no right to remain in a representation and insist, contrary to a client's instruction, that the client comply with the lawyer's view of the client's intended and lawful course of action.").

3. Permitting Defense Lawyers to Override a Client's Express Desire to Maintain Innocence Undermines the Attorney-Client Relationship

The relationship between defense counsel and client is the cornerstone of ensuring the proper, efficient, and just administration of justice. That relationship, however, would be irreparably damaged should a defense lawyer be permitted to concede guilt against the accused's express objection.

The fundamental faith and trust placed by the defendant in his attorney would evaporate. Rather than a zealous advocate for his interests, the defendant would now view the lawyer as yet another impediment to maintaining his innocence and securing an acquittal. In addition, a client's comfort in confiding in his counsel would be hindered by the well-founded concern that information shared by the defendant could result in a concession of guilt against his wishes. Other aspects of the accused's defense also would be injured. Most fundamentally, many defendants might well decide that the only avenue to preserve their ability to not concede guilt would be to proceed *pro se* and remove a defense lawyer from the equation entirely. Defense counsel, meanwhile, will be faced with the deeply problematic challenge of determining whether (and when) they should defy their client and concede guilt, over the client's objections.

Defense counsel enjoy latitude regarding certain trial tactics. Such discretion, however, may not overcome the fundamental rights of the accused.

Accordingly, counsel cannot override a defendant's decision to maintain his innocence.

C. Defense Lawyers Have Strategic Options Beyond Conceding Guilt

Defense counsel in a capital case may wish to concede guilt in order to preserve credibility for the penalty phase. To the extent a defendant provides clear and express instructions not to concede guilt, however, defense lawyers have other strategic and tactical options to retain credibility.

First, and perhaps most significantly, defense counsel can emphasize that the government must be put to its proof, with the formidable protection for the defendant of a requirement of proof beyond a reasonable doubt. *In re Winship, supra*; *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Jackson v. Virginia*, 443 U.S. 307 (1979). This requirement can be emphasized by defense counsel in both opening statement and closing argument, and, of course, the court will instruct the jury regarding this burden. *Victor v. Nebraska*, 511 U.S. 1 (1994).

Second, during trial, defense counsel has many legitimate options for attacking the government's case, without conceding guilt. These may include challenges to the admissibility of evidence, challenges to the reliability of evidence, conduct of cross-examination, and vigorous advocacy on jury instructions and legal motions. There are many opportunities to act as an effective advocate while retaining credibility with the jury; but those otherwise effective measures are completely undermined when counsel concedes guilt over the defendant's objection.

Finally, even should a jury determine that the government has met its burden of proving guilt beyond a reasonable doubt, the penalty phase still presents defense lawyers with an opportunity to present extensive mitigating evidence on behalf of the defendant. *See, e.g.*, Welsh S. White, Litigating in the Shadow of Death 85 (2006). Defense lawyers may present witnesses and available evidence regarding the defendant's character, family history, community, and other factors relevant to who the defendant is beyond his crime. *See* Scott E. Sundby, *Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1592 (1998). Through this mitigating evidence, counsel can provide jurors with a fuller understanding of the defendant, as well as a sound basis to appreciate that the accused remains an individual worthy of their compassion and empathy, or an individual who does not otherwise merit society's most severe sanction. *Id.*

* * * * *

Permitting a defense lawyer to concede guilt against a defendant's express desire violates core, fundamental rights. Although such a concession may be viewed by a defense lawyer as in the client's strategic best interests, a defendant's express desire to maintain innocence may not be overridden. Defense lawyers must honor that decision and zealously defend the accused with the full range of remaining strategic and tactical options.

CONCLUSION

For the reasons stated above, the decision of the Louisiana Supreme Court should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

ROBERT MCCOY,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

BRIEF OF *AMICI CURIAE*
TEN LAW SCHOOL PROFESSORS AND
THE ETHICS BUREAU AT YALE
IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of the ten undersigned law professors and the Ethics Bureau at Yale. The individuals are teachers at law schools throughout the United States whose research and writing concentrates in the field of lawyer professional responsibility.

Amici have no direct interest in the outcome of this litigation. Because this case reflects a wholesale violation of a lawyer's ethical obligation to obey his client's lawful objectives during the course of a legal representation, *Amici* believe these volunteered views might assist the Court in resolving the important issues presented.

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[1] Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *Amici* and their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief. The individual *Amici's* institutional affiliations are provided only for purposes of identification. The Ethics Bureau at Yale is a student clinic of the Yale Law School. The views expressed herein are not necessarily those of Yale University or the Yale Law School.

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SUMMARY OF ARGUMENT

The client is the master of the objectives of his own defense. Contrary to the Louisiana Supreme Court's decision here, the client, not his lawyer, is entitled to decide whether to admit guilt or maintain his innocence. The Constitution, the professional rules adopted by Louisiana, forty-eight other states, and the District of Columbia,[2] and enduring

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[2] The rules adopted by these states are based on the American Bar Association's Model Rules of Professional Conduct. *State Adoption of the ABA Model Rules of Professional Conduct*, Am. Bar Ass'n, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html. In all respects relevant to this case, the Louisiana Supreme Court has adopted the language of the Model Rules for the Louisiana Rules of Professional Conduct. The Louisiana Supreme Court did not adopt the Preamble, Scope, or Terminology sections of the Model Rules. Nor has it adopted the comments to the Model Rules. Nevertheless, the Louisiana Task Force that recommended that Louisiana adopt the rules without comments observed that the comments should still be considered "precatory to any interpretation or application of the Louisiana version of the Model Rules, except to the extent that they are inconsistent with the verbiage in the rules adopted by the House of Delegates." *Report and Recommendation of the*

principles of agency law all support this view of the client's relationship with counsel.[3] As this Court recognized in *Faretta v. California*, the Sixth Amendment ensures that unwanted lawyers are not "thrust . . . upon the accused." 422 U.S. 806, 820 (1975). Likewise, the Sixth Amendment ensures that unwanted concessions of guilt are not thrust upon

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Task Force To Evaluate the American Bar Association's Model Rules of Professional Conduct (Nov. 23, 1985), *quoted in* N. Gregory Smith, *Missed Opportunities: Louisiana's Version of the Rules of Professional Conduct*, 61 La. L. Rev. 1, 11 (2000). As such, it is *Amici*'s view that the comments to the Model Rules are still a helpful source for interpreting the Louisiana Rules of Professional Conduct.

[3] We recognize, of course, that Louisiana's Supreme Court is the final arbiter of the meaning of the state's ethics rules. We write, however, to explain how pervasive authority in American jurisdictions rejects the Louisiana view and in the hope and expectation that this contrary national view will aid the Court in its application of the constitutional issues before it. We note that the Court has previously looked to national ethical standards in construing constitutional requirements. *See, e.g., Nix v. Whiteside*, 475 U.S. 157 (1986) (citing to common understandings of professional ethics in construing lawyers' Sixth Amendment duties when a client plans to present perjured testimony at trial).

clients who are intent on defending the charges against them. While this Court held in *Florida v. Nixon*, 543 U.S. 175 (2004), that a lawyer may concede his client's guilt where a client is unresponsive to the lawyer's requests for guidance—that is, the lawyer may pursue a strategic decision where the client provides no direction—that decision in no way undermined the overarching principle that the client decides the fundamental objectives of his own defense. And it provides no support for the notion that lawyers are allowed to ignore their client's repeated instructions *not* to concede guilt.

Louisiana Rule of Professional Conduct 1.2(a), like ABA Model Rule 1.2(a), mandates that a lawyer abide by a client's instructions regarding "the objectives of representation." La. Rules of Prof'l Conduct r. 1.2(a); Model Rules of Prof'l Conduct r. 1.2(a) (Am. Bar Ass'n 1983). From the beginning, Robert McCoy elected to exercise his authority on that topic. He repeatedly told counsel that his key objective was to go to trial to maintain his innocence and challenge the prosecution's case. As a result, his lawyer, Larry English, was bound by the rules of ethics—as well as the Sixth Amendment and basic agency principles—to conform his representation accordingly. Yet, in his opening statement to the jury and again in closing, Mr. English affirmatively told the jury that Mr. McCoy was guilty.

Mr. English defended his actions as a strategic decision, designed to establish that his client, Mr. McCoy, was suffering from a mental

defect and unable to form the necessary criminal intent for first-degree murder. But a strategic decision that does not conform to the client's objectives is ethically impermissible. The Rules of Professional Conduct counsel that lawyers may make strategic decisions regarding the "*means* by which" the lawyer aims to achieve the client's objectives, not contravene the objectives themselves. La. Rules of Prof'l Conduct r. 1.2(a) (emphasis added); *see also* Model Rules of Prof'l Conduct r. 1.2(a). By explicitly declaring to the jury Mr. McCoy's guilt despite Mr. McCoy's clearest of directives not to do so, Mr. English violated his professional obligations and denied his client the fundamental right to challenge the prosecutor's allegations of guilt before a jury of his peers.

The common law has long recognized that lawyers are their clients' agents. *See C.I.R. v. Banks*, 543 U.S. 426, 436 (2005) (describing the attorney-client relationship as "a quintessential principal-agent relationship"). Principles of agency law have often been used to illuminate a lawyer's duties in the course of representation. *See Maples v. Thomas*, 565 U.S. 266, 283 (2012); *Holland v. Florida*, 560 U.S. 631, 659-60 (2010) (Alito, J., concurring). As agents, lawyers' strategic judgments can never provide a sufficient reason to deviate from the explicit limitations concerning fundamental objectives placed on their authority by their client-principals. Restatement (Third) of Agency, § 8.09 (Am. Law Inst. 2006) ("[T]he underlying premise of a relationship of agency is action by the agent that is

consistent with the principal's manifestation of assent, not whether an agent's action is in fact beneficial to the principal."). This basic tenet of agency law is also reflected in the Restatement of the Law Governing Lawyers, which notes that the client defines the objectives of his representation, and in so doing, "limit[s] the lawyer's authority" to act on his behalf. Restatement (Third) of the Law Governing Lawyers § 21 cmt. b. (Am. Law Inst. 2000). Thus, once Mr. McCoy made his decision to take the path of contesting his guilt, a fundamental decision reserved to him, Mr. English never possessed the authority to disregard his client's choice.

No competing ethical obligations complicated Mr. English's ethical duties in this case. The Louisiana Supreme Court relied on Rule 3.3, the duty of candor, to conclude that Mr. English could not conform his representation to Mr. McCoy's wishes. JA84 n.30; *id.* at 208. This reliance was misplaced. Based on the trial court's reasoning, the Louisiana Supreme Court determined that Mr. English could not present the alibi defense Mr. McCoy requested without the risk of suborning perjury. JA83. Contrary to the Louisiana Supreme Court's conclusion, however, there was never any issue of perjury in this case. But even if there were, basic norms of professional conduct and Model Rule 3.3 provide specific procedures for lawyers who believe their clients may testify falsely. *See* Model Rules of Prof'l Conduct, r. 3.3, cmt. 10. Nowhere does

the Model Rule permit a lawyer to concede his client's guilt against his client's wishes.

In addition, the Louisiana Supreme Court pointed to a lawyer's ethical duty under Louisiana Rule 1.2(d) not to assist his client in "criminal or fraudulent" conduct, asserting that Rule 1.2(d) prevented Mr. English from maintaining his client's "unflinchingly maintained claim of innocence." JA80. The Louisiana Supreme Court's interpretation of the prohibition against assisting in "criminal or fraudulent" conduct is plainly inconsistent with constitutional obligations lawyers owe to their clients. A criminal defense lawyer is duty-bound, where his client directs him to do so, to put the government to its proof and urge acquittal due to weaknesses in the prosecution's case. *See* La. Rules of Prof'l Conduct r. 3.1; Model Rules of Prof'l Conduct r. 3.1. The Louisiana Supreme Court's misunderstanding of the lawyer's obligations under the Louisiana Rules would bar many lawyers from fulfilling their constitutional and ethical obligations to hold the prosecution to its burden of proving the case beyond a reasonable doubt. *See United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984) ("[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt."); La. Rules of Prof'l Conduct r. 3.1 (explaining that a defense lawyer must defend his client's case so as to "require that every element of the case be established"); *see also* Model Rules of Prof'l Conduct r. 3.1. Adopting the Louisiana

Supreme Court's view of a lawyer's ethical duties would substantially undermine the lawyer's basic role of arguing why the jury should find reasonable doubt and why the prosecution failed to achieve that constitutionally required standard of proof.

While not every violation of the Rules of Professional Conduct has a constitutional dimension, the ethical failures in this case do. Mr. English usurped Mr. McCoy's constitutionally guaranteed right to define the objectives of the representation. This Court should not "accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime," *Jones v. Barnes*, 463 U.S. 745, 764 (1983) (Brennan, J., dissenting), and allow Mr. McCoy to suffer the consequences of Mr. English's misconduct.

ARGUMENT

I. A CRIMINAL DEFENDANT HAS THE RIGHT TO SERVE AS THE MASTER OF THE OBJECTIVES OF HIS OWN DEFENSE.

The client's right to be the master of his own defense is central to the protections provided by the Sixth Amendment of the United States Constitution. *See United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) ("[W]hile defense counsel serves as an advocate for the client, it is the client who is the master of his or her own defense."). The right to put on a defense is granted directly to the accused, not

his lawyer. *Faretta v. California*, 422 U.S. 806, 819 (1975). The Sixth Amendment also grants a client the personal right to choose and refuse counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144-48 (2006); *Faretta*, 422 U.S. at 819. These rights of self-representation and counsel-selection reflect an underlying commitment to placing the defendant front and center, in control of his defense. Counsel unavoidably must make many forensic decisions during the course of a trial without first consulting the client, *see* Restatement (Third) of the Law Governing Lawyers § 21(3) (acknowledging that a lawyer "may take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client"), but the lawyer remains at all times bound to respect the client's fundamental wishes regarding the objectives of the representation. *See Faretta*, 422 U.S. at 820 ("[The Sixth Amendment] speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant."). The Rules of Professional Conduct and basic principles of agency law both support this view of the client's relationship with counsel.

A. Fundamental Principles of Legal Ethics Required that Mr. English Follow Mr. McCoy's Instructions.

The Rules of Professional Conduct reflect the profession's common understanding of lawyers' ethical obligations in the course of representation. Louisiana Rule of Professional Conduct 1.2(a) establishes the proper allocation of decision-making authority between clients and their lawyers. The rule requires that a lawyer "abide by a client's decisions concerning the objectives of representation, and . . . consult with the client as to the means by which [those objectives] are to be pursued." La. Rules of Prof'l Conduct r. 1.2(a); *see also* Model Rules of Prof'l Conduct r. 1.2(a). Mr. McCoy repeatedly proclaimed to Mr. English and the court that he was not guilty and did not want his counsel to concede his guilt. That fundamental decision was Mr. McCoy's to make.

Once Mr. McCoy established that his objective was maintaining his innocence, the ABA Model Rules make clear that Mr. English could not deviate from that objective for strategic reasons. *See* Model Rules of Prof'l Conduct r. 1.2 cmts. 1-2 (clarifying that Rule 1.2 "confers upon the client the ultimate authority to determine the purposes to be served by legal representation" and that clients only "normally defer to the special knowledge and skill of their lawyer with respect *to the means* to be used to accomplish their objectives") (emphasis added). Confirming that basic principle, Louisiana Rule

1.4(b), the rule describing the lawyer's duty to communicate, requires a lawyer to affirmatively explain the legal circumstances, seek his client's input, and empower his client to determine the goals of the representation, placing the burden on the lawyer to initiate the communication. La. Rules of Prof'l Conduct r. 1.4(b) ("The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."); *see also* Model Rules of Prof'l Conduct r. 1.4(b). The lawyer's obligations to consult with the client helps ensure that the lawyer does not take any action that conflicts with the client's objectives by ensuring that the client is made aware when any such conflicts arise.

The drafting history of ABA Model Rule 1.2(a) further confirms that the lawyer's strategic decisions must conform to the client's objectives. In 1983, the Kutak Commission, which took the laboring oar in developing the draft of the ABA Model Rules, explicitly declined to adopt a proposed revision to Model Rule 1.2 which would have given lawyers more strategic authority. This proposed revision would have established lawyers' affirmative right to "determine the means by which [objectives] are to be pursued." Importantly, the ABA chose not to grant lawyers this right and instead to mandate that lawyers consult with clients concerning appropriate means. The development of Model Rule 1.2 thus further confirms that Mr. English was not permitted

to deviate from his client's clear instructions not to confess his guilt.

Mr. McCoy's objective—to defend against the government's charges—was fundamental to the representation, as it was rooted in Mr. McCoy's constitutional right to personally participate in the criminal process and contest his guilt before his peers. *See Faretta*, 422 U.S. at 819 ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."). Public trials are more than exercises in strategic lawyering. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) ("Our cases have uniformly recognized the public trial guarantee as one created for the benefit of the defendant."). Lawyers' particular expertise thus does not grant them license to make whatever decisions they believe are necessary to minimize harm to their clients. To decide otherwise would allow a lawyer's utilitarian calculations to nullify fundamental objectives, the establishment of which is the sole domain of the client.

B. Principles of Agency Law Required That Mr. English Follow Mr. McCoy's Instructions.

The requirement that a lawyer must comply with the client's fundamental case objectives originates in the common law of agency. Indeed, the attorney-client relationship is "a quintessential

principal-agent relationship." *C.I.R. v. Banks*, 543 U.S. 426, 436 (2005). In recent cases, this Court has drawn on the law of agency to resolve questions about the scope of lawyers' duties in relation to their client-principals. *See Maples v. Thomas*, 565 U.S. 266, 283 (2012); *Holland v. Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring). Lawyers, as agents of their clients, have a duty "to take action only within the scope of the agent's actual authority." Restatement (Third) of Agency § 8.09. Actual authority exists only when "the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement (Third) of Agency § 2.01. The agent has a duty to comply with the principal's lawful instructions. Restatement (Third) of Agency § 8.09(2).

The Restatement of the Law Governing Lawyers reflects these agency principles in defining the allocation of decision-making authority between a lawyer and client. The objectives of the representation must be "defined by the client" and pursued through consultation with the client. Restatement (Third) of the Law Governing Lawyers § 21. Thus, the client "may limit the lawyer's authority by contract or instructions." *Id.* cmt. b. Here, Mr. McCoy made his opposition to conceding guilt unmistakably clear. As a matter of basic agency law, Mr. English had no authority to violate his client's wishes and concede guilt on Mr. McCoy's behalf.

The Restatement makes clear that "a lawyer may not continue a representation while refusing to follow a client's continuing instruction." *Id.* cmt. d. Instead, the lawyer may only advise the client on the advantages and disadvantages of his decision and seek to dissuade the client from adhering to it. If the client, nonetheless, maintains his position, the choices before the lawyer are to follow the client's instruction or voluntarily withdraw from the representation. *Id.*

These agency principles demonstrate why Mr. English was not permitted to concede his client's guilt. An agent's duty to act within the confines of the principal's wishes always takes precedence over an agent's independent conclusions as to whether his actions are "beneficial to the principal." Restatement (Third) of Agency § 8.09 cmt. b. (explaining the rule that an agent is liable for a loss caused to the principal by the agent's acting beyond his authority, even if the loss would have been greater had the agent acted within his authority). Otherwise, the Restatement notes, "an agent might be tempted to act or to continue to act without actual authority in the hope that matters will turn out sufficiently well that the principal will not suffer loss." *Id.* Such actions would disregard the "underlying premise of a relationship of agency," which is that the crux of agent action must be whether it "is consistent with the principal's manifestation of assent, not whether an agent's action is in fact beneficial to the principal." *Id.* But Mr. English failed to appreciate his role as his client's agent. Here, Mr. McCoy's

objective of contesting the charges against him was unquestionably lawful, and Mr. English had no right to deviate from that objective—even if he believed a strategic deviation would help his client.

C. *Florida v. Nixon* Did Not Alter the Basic Rule that Lawyers Must Follow Client Instructions Regarding Concessions of Guilt.

More recent Supreme Court precedent, including *Florida v. Nixon*, does not alter the fact that Mr. English, as Mr. McCoy's lawyer, was required to abide by Mr. McCoy's stated objectives for the representation. *Nixon* addressed the issue of whether the lawyer must "obtain consent" before conceding the client's guilt at trial. 543 U.S. 175, 187 (2004). There, "counsel inform[ed] the defendant of the strategy counsel believe[d] to be in the defendant's best interest and the defendant [was] unresponsive." 543 U.S. at 192 (2004). *Nixon* did not deal with the very different circumstance presented in this case; far from being "unresponsive," Mr. McCoy vigorously objected when Mr. English informed Mr. McCoy of his intention to concede guilt. From the perspectives of the law of agency and legal ethics, the difference between these two situations is crucial, for it is the difference between a reasonable strategic decision based on limited information and total inversion of the attorney-client relationship.

In this respect, the right to decide whether to admit guilt is like the right to self-representation. It

is widely held that the right to self-representation may be implicitly waived if the defendant does not insist upon it in clear and unequivocal terms. *See McGhee v. Dittmann*, 794 F.3d 761, 769-70 (7th Cir. 2015) ("[M]any courts . . . have interpreted *Faretta* as requiring that a defendant clearly and unequivocally articulate a desire to represent himself in order to invoke his *Faretta* rights." (internal citations omitted)). If a competent defendant "insists" upon exercising his right to self-representation, however, he must be permitted to do so. *Faretta v. California*, 422 U.S. 806, 807 (1975). So too with the right to decide whether to admit guilt. Once Mr. McCoy insisted upon asserting innocence and holding the government to its burden of proof, Mr. English was obligated to do so.[4]

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[4] *See Murphy v. Bradshaw*, 2008 WL 1753241, at *6 n.6 (S.D. Ohio Apr. 11, 2008) (distinguishing *Nixon* from the case at bar "because it is clear that [the defendant] actively opposed the strategy of conceding" guilt); *Steward v. Grace*, 2007 WL 2571448, at *8 (E.D. Pa. Aug. 30, 2007) (noting that *Nixon*'s holding only addressed circumstances where a client is unresponsive to his lawyer's inquiries about conceding guilt) ; *State v. Humphries*, 336 P.3d 1121, 1125 (Wash. 2014) ("Although courts can presume a defendant consents to a stipulation, this presumption disappears where the defendant expressly objects."); *People v. Bergerud*, 223 P.3d 686, 699 n.11 (Colo. 2010) (distinguishing *Nixon* based on the defendant's explicit objection to the actions his lawyer took on his behalf); *Cooke v. State*, 977 A.2d 803, 847 (Del. 2009) ("However, where, as here, the defendant *adamantly* objects to counsel's proposed objective to concede guilt and pursue a verdict of guilty but mentally ill, and counsel proceeds with that objective anyway,

II. NOWHERE DO THE RULES OF ETHICS JUSTIFY A DECISION TO CONCEDE GUILT.

In addition to the ethical obligations that a lawyer owes to his client, the lawyer also has duties to the public and to the tribunals in which he practices. Among other things, these duties prohibit the lawyer from offering evidence he knows to be false. *See Nix v. Whiteside*, 475 U.S. 157, 168 (1986); La. R. Prof'l Conduct r. 1.2(d), 3.3(a); *see also* Model Rules of Prof'l Conduct r. 1.2(d), 3.3(a). The Louisiana Supreme Court determined that these rules justified Mr. English's conduct in this case.

But Mr. English never suggested that he had an ethical concern with presenting perjured testimony. Rather, he testified that his concession of Mr. McCoy's guilt was designed to preserve his credibility with the jury and assist him in obtaining a sentence of less than death at the penalty phase—in other words, Mr. English improperly decided that his objective regarding sentencing trumped Mr. McCoy's objective of obtaining an acquittal. *See* JA284-90. Indeed, Mr. English testified that he was certain Mr. McCoy "truly believed" in his own innocence throughout the proceedings. JA285. Even if Mr. English *believed* Mr. McCoy's alibi defense

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the defendant is effectively deprived of his constitutional right to decide personally whether to plead guilty to the prosecution's case, to testify in his own defense, and to have a trial by an impartial jury.").

was false, a proper interpretation of the ethical rules would not have permitted Mr. English to refuse to present that defense. And in no circumstances, even if Mr. English had actually known McCoy's defense was false—which he did not—could Mr. English ethically have conceded Mr. McCoy's guilt to the jury over his express objection.

In short, the Rules did not prohibit Mr. English from complying with Mr. McCoy's "unflinchingly maintained claim of innocence." JA80. It is a fundamental principle of legal ethics that a lawyer must vigorously defend even a client he believes to be guilty. The Rules of Professional Conduct therefore never prohibit the defense lawyer from seeking an acquittal in a criminal proceeding, regardless of the merits of the client's defense. *See* Model R. Prof'l Conduct r. 3.1. Nor was Mr. English permitted to override Mr. McCoy's claim of innocence by conceding guilt to the jury.

A. The Duty of Candor Does Not Allow the Lawyer To Concede Guilt Over the Client's Objection.

A lawyer's obligation to advocate for his client with zeal is qualified by another important ethical obligation, namely the duty of candor to the tribunal. La. Rules of Prof'l Conduct r. 3.3; *see also* Model Rules of Prof'l Conduct r. 3.3. The duty of candor to the tribunal prohibits the lawyer from "offer[ing] evidence that the lawyer knows to be false." La. Rules of Prof'l Conduct r. 3.3; *see also* Model Rules of Prof'l Conduct r. 3.3. But this strict prohibition only applies if the lawyer *knows* that the evidence is false, as the rule places it within the lawyer's discretion whether to offer evidence that the lawyer only "reasonably believes" to be false. La. Rules of Prof'l Conduct r. 3.3. Crucially, the rule does not allow the lawyer to refuse to offer the testimony of a defendant-client if he only "reasonably believes" that the client intends to testify falsely. *Id.* The Model Rules counsel that the lawyer should "resolve doubts about the veracity of testimony or other evidence in favor of the client." Model Rules of Prof'l Conduct r. 3.3, cmt. 8. Mr. English never suggested that he *knew* Mr. McCoy's alibi defense was false; to the contrary, Mr. English testified that Mr. McCoy consistently and vehemently maintained that he was innocent and out of the state when the killings took place, and that Mr. McCoy "truly believed" he was innocent. Under those circumstances, Mr. English had an ethical obligation to vigorously defend Mr.

McCoy whether or not Mr. English personally believed in Mr. McCoy's innocence.

Even if a lawyer is faced with a client who insists he present testimony the lawyer *knows* is false—which did not occur here—the lawyer can never concede the client's guilt over his objection. Rather, the rules set forth specific steps for the lawyer to take in that situation. First, the lawyer should "seek to persuade the client that the evidence should not be offered." *Id.* at r. 3.3, cmt. 6; *see Nix v. Whiteside*, 475 U.S. at 169 ("It is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct."); *In re Young*, 2003-0274, p. 8 n. 13 (La. 6/27/03), 849 So.2d 25, 30 n. 13 (La. 2003) ("In oral argument, respondent suggested his true reason for seeking to withdraw was that his client intended to perjure himself at trial. . . . [E]ven assuming respondent's allegations are true, he should have first sought to dissuade his client from giving perjured testimony."). If the client, nevertheless, insists on offering such false evidence, then the lawyer must refuse to comply with the demand. La. Rules of Prof'l Conduct r. 3.3(a)(3); Model Rules of Prof'l Conduct r. 3.3, cmt. 6 ("If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence."). Because such actions may adversely affect the lawyer's relationship with the client, the lawyer may be required "to seek permission of the tribunal to withdraw" if

compliance with the rule "results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client." Model Rules of Prof'l Conduct r. 3.3, cmt. 15; *see Nix v. Whiteside*, 475 U.S. at 170 ("[T]he Model Rules and the commentary . . . expressly permit withdrawal from representation as an appropriate response of an attorney when the client threatens to commit perjury."); *In re Young*, 2003-0274, p. 8 n. 13 (La. 6/27/03), 849 So.2d at 30 n. 13 ("If the client persisted in his criminal or fraudulent conduct [of offering perjured testimony], [the lawyer] could have moved to withdraw based on Rule 1.16(b)(1) (a lawyer may withdraw if the client "persists in a course of action involving the lawyer's services that the lawyer believes is criminal or fraudulent.").

Rule 3.3 therefore provides clear and specific guidance for dealing with a client who intends to offer false testimony. Nowhere does the rule suggest that the prospect or delivery of false testimony justifies a decision to concede guilt over the client's objection, as the Louisiana Supreme Court suggested. At most, a lawyer in such a situation would have been allowed to make a limited refusal to comply with the client's unlawful demands, and potentially to seek to withdraw from the case. *See* Model R. Prof'l Conduct at r. 3.3, cmts. 5-6. What the Rules of Professional Conduct do not allow, however, is an unwanted and unauthorized concession of guilt to be thrust upon the accused.

B. Seeking an Acquittal Is Always a Lawful and Ethical Objective of Representation in a Criminal Proceeding.

Rule 1.2 of the Louisiana Rules of Professional Conduct prohibits the lawyer from assisting a client to engage "in conduct that the lawyer knows is criminal or fraudulent." La. Rules of Prof'l Conduct r. 1.2(d); *see also* Model Rules of Prof'l Conduct r. 1.2(d). The Louisiana Supreme Court suggested that Mr. English could not have "advanced [Mr. McCoy's] 'unflinchingly maintained claim of innocence'" without "run[ning] afoul of his ethical obligations" under this rule. *See* JA80 (citation omitted). That is wrong. The lawyer never runs afoul of his ethical obligations by advocating for his client's not-guilty plea, for the Rules of Professional Conduct charge the lawyer with defending even the guilty client.

By prohibiting the lawyer from engaging in criminal or fraudulent conduct, Rule 1.2(d) places a reasonable limitation on the scope of the lawyer's responsibilities to the client. In no way, however, does Rule 1.2(d) prohibit the lawyer from seeking an acquittal on his client's behalf. Indeed, no rule has such a prohibition. Far from considering it criminal or fraudulent to assist the client in seeking an acquittal, the Model Rules indicate that the lawyer generally carries a constitutional obligation to do so, if that is the client's wish. *See* Model Rules of Prof'l Conduct r. 3.1, cmt. 3 (stating that the prohibition on making frivolous arguments is "subordinate to

federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.").

The fact that Mr. English found the evidence against his client to be "overwhelming" did not justify his decision to concede Mr. McCoy's guilt. JA43. While a defense lawyer must, of course, be "interested in preventing the conviction of the innocent, . . . absent a voluntary plea of guilty," it is crucial that a defense lawyer also "defend his client whether he is innocent or guilty." *United States v. Wade*, 388 U.S. 218, 257 (1967) (White, J., concurring in part and dissenting in part). The Rules of Professional Conduct are clear that seeking an acquittal is always a lawful objective of representation in a criminal proceeding regardless of the merits of the defense. *See* La. Rules of Prof'l Conduct r. 3.1 (explaining that "[a] lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may . . . so defend the proceeding as to require that every element of the case be established" without violating the prohibition on making frivolous arguments); *see also United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984) ("[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt."); Model Rules of Prof'l Conduct r. 3.1.

CONCLUSION

Robert McCoy was entitled to a lawyer who would zealously defend his interests. His lawyer, Larry English, took on this obligation and all the ethical and constitutional duties that came with the representation. But from the moment the trial began, Mr. English violated his client's express directions, conceded Mr. McCoy's guilt before the jury, and failed to submit the prosecution's case to even the barest adversarial testing. In so doing, Mr. English acted in clear violation of his ethical obligations as a lawyer as well as Mr. McCoy's constitutional rights.

The Louisiana Supreme Court's judgment should be reversed.

Respectfully submitted,

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